Supreme Court, U.S.
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No. ———

In The Supreme Court of the United States

October Term, 1997

South Central Bell Telephone Company, *et al.*,
Petitioners,

v.

State of Alabama and
State Department of Revenue,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Alabama Supreme Court, following the same practice that this Court condemned in *Richards v. Jefferson County*, 517 U.S. 793 (1996), deprived petitioners of the due process of law guaranteed by the Fourteenth Amendment by barring them from presenting a federal constitutional challenge to a state tax on the theory that petitioners were bound by a prior state-court judgment in a case to which they were not parties, in which they were not represented, and of which they had no notice.

2. Whether Alabama's franchise tax impermissibly discriminates against interstate commerce, in violation of the Commerce Clause, by taxing Alabama corporations only on the par or stated value of their stock (the amount of which is determined solely by the corporation itself) while taxing out-of-state corporations on the value of essentially all their capital employed in Alabama, with the demonstrated result that Alabama corporations on average pay less than one-fifth of the franchise tax they would pay if they were incorporated outside Alabama.

3. Whether a taxpayer who has paid an unconstitutional state tax under legal compulsion and who then sues for a refund in accordance with applicable state refund procedures is entitled, under the Due Process Clause of the Fourteenth Amendment and this Court's decisions in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), *Reich v. Collins*, 513 U.S. 106 (1994), and *Newsweek, Inc. v. Florida Department of Revenue*, 118 S. Ct. 904 (1998) (per curiam), to meaningful backward-looking relief sufficient to rectify the unlawful exaction.

PARTIES TO THE PROCEEDINGS

The following list identifies all parties to the proceedings in the Alabama Supreme Court:

State of Alabama, State Department of Revenue
South Central Bell Telephone Company
BellSouth Telecommunications, Inc.
BellSouth Corporation
BellSouth Services, Inc.
BellSouth Financial Services Corporation
BellSouth Advertising & Publishing Corporation
BellSouth Resources, Inc.
BellSouth Products, Inc.
Alabama Cellular Services, Inc.
CSX Transportation, Inc.
Seaboard Coastline Railroad Company
Louisville & Nashville Railroad Company
Seaboard System Railroad, Inc.

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state the following.

South Central Bell Telephone Company and BellSouth Services, Inc., are predecessors of BellSouth Telecommunications, Inc. Each of BellSouth Telecommunications, Inc., BellSouth Financial Services Corporation, BellSouth Advertising & Publishing Corporation, BellSouth Resources, Inc., BellSouth Products, Inc., and Alabama Cellular Services, Inc., is (directly or indirectly) a wholly owned subsidiary of BellSouth Corporation. These filers' non-wholly owned operating subsidiaries are:

1155 Peachtree Associates
Infoventures
Infoventures of Atlanta
Beijing Ji Tong—BellSouth Communication & Information Engineering Co., Ltd.
BellSouth New Zealand
Compania de Radiocomunicaciones Moviles S.A.
Telcel Celular C.A.

Tele 2000, S.A.
BellSouth Wireless Data, L.P.
RAM Mobile Data Belgium, S.C.S.
RAM Mobile Data C.V.
BellSouth Carolinas PCS, L.P.
Bloomington Cellular Telephone Company, Chattanooga MSA Limited Partnership
Decatur RSA Limited Partnership
Florida RSA #2B (Indian River) Limited Partnership
Georgia RSA No. 1 Limited Partnership
Georgia RSA No. 2 Limited Partnership
Georgia RSA No. 3 Limited Partnership
Gulf Coast Cellular Telephone Company
Jacksonville MSA Limited Partnership
Lafayette MSA Limited Partnership
Los Angeles Cellular Telephone Company
Louisiana RSA No. 7 Cellular General Partnership
Louisiana RSA No. 8 Limited Partnership
MCTA, Memphis SMSA Limited Partnership
Muncie Cellular Telephone Company, Inc.
Orlando SMSA Limited Partnership
Richmond Cellular Telephone Company
Tennessee RSA Limited Partnership
Terre-Haute Cellular Telephone Company, Inc.

CSX Transportation, Inc., is a wholly owned subsidiary of CSX Corporation. Seaboard Coastline Railroad Company, Louisville & Nashville Railroad Company, and Seaboard System Railroad, Inc., are each predecessors of CSX Transportation, Inc. CSX Transportation, Inc.'s non-wholly owned subsidiaries are:

Akron Union Passenger Depot Company
Allegheny and Western Railway Company
Augusta and Summerville Railroad Company
Baltimore and Cumberland Valley Rail Road Extension Company
Beaver Street Tower Company
Central Transfer Railway and Storage Company

Chatham Terminal Company
Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company
Distribution Services, Inc.
Energy Dominion
Gemetal Distribution Services, Inc.
Georgetown Potomac Company
Harbour Associates
Helm-Atlantic Associates, L.P.
High Point, Thomasville & Denton Railroad Company
Home Avenue Railroad Company
Independent Rail Services, Inc.
Indiana Rail Road Company
Lakefront Dock and Railroad Terminal Company
Mahoning State Line Railroad Company
Midland United Corporation
North Charleston Terminal Company
One James Center Associates
Richmond Center Associates
Richmond Center Associates II
Savannah Harbor Resort Developers, LLC
Savannah Harbor Venture Partners, LLC
SHRD, Inc.
Unified Services, Inc.
Washington Harbour Associates Limited Partnership
Winston-Salem Southbound Railway Company
Woodstock & Blocton Railway Company

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IN THE

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OCTOBER TERM, 1997

No. ———

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Petitioners,

v.

STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

Alabama's corporate franchise tax discriminates against out-of-state corporations, both facially and as applied. The State taxes Alabama corporations based solely on the par or stated value of their stock—an amount that state law permits a corporation to set as low as it chooses. Alabama corporations can therefore diminish their franchise tax liability simply by reducing the par or stated value of their stock to a token amount. By contrast, the State taxes out-of-state corporations based on the value of essentially all their capital employed in Alabama—an amount that a corporation cannot manipulate through an artificial adjustment to the par or stated value of its stock. This disparate treatment of in-state and out-of-state corporations has a predictable result: Alabama corporations pay less than one-fifth of the franchise tax they would pay if they were out-of-state corporations.

Petitioners (all of whom are incorporated outside of Alabama) challenged the State's franchise tax on the ground that it discriminates against interstate commerce in violation of the Commerce Clause. The Alabama trial court, though expressly acknowledging that the tax is unlawfully discriminatory under this Court's Commerce Clause precedents, nevertheless denied relief. Invoking principles of "res judicata," the court ruled that petitioners' challenge was barred by a 1989 judgment upholding the franchise tax, even though petitioners were complete strangers to the prior litigation. On appeal, the Supreme Court of Alabama—in a five-to-four decision, and over a vigorous dissent—affirmed without opinion.

The Alabama Supreme Court's decision is incompatible with this Court's controlling constitutional rulings. First, there can be no doubt, particularly after this Court's decision in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), that Alabama's discriminatory franchise tax violates the Commerce Clause. Indeed, not a single one of the ten state-court judges involved in this case was willing to express a contrary view. Second, just two Terms ago, in another state tax case from Alabama, this Court ruled that the Alabama Supreme Court could not, consistent with the Due Process Clause of the Fourteenth Amendment, "bind a litigant to a prior judgment to which he was not a party." *Richards v. Jefferson County*, 517 U.S. 793, 805 (1996). That rule "clearly applies," the Court held, "when a taxpayer seeks a hearing to prevent the State from subjecting him to a levy in violation of the Federal Constitution." *Id.*

The Alabama Supreme Court, in default of its constitutional responsibility, simply defied these controlling decisions. Review by this Court is therefore necessary both to enforce the State's obligations under the Supremacy Clause and to vindicate petitioners' clearly applicable rights under the Commerce Clause and the Due Process Clause. Review is all the more appropriate here because

this Court, in exercising its certiorari jurisdiction, has long recognized that it has a special role in assuring allegiance to Commerce Clause principles and in guarding against efforts (like those indulged in here) to place artificial roadblocks in the way of meritorious challenges to state taxation schemes.

OPINIONS BELOW

The order and accompanying opinions of the Supreme Court of Alabama (Pet. App. 1a-14a) have not yet been reported. The opinion of the Fifteenth Judicial Circuit Court of Montgomery County, Alabama (*id.* at 15a-22a) is unreported.

JURISDICTION

The Supreme Court of Alabama entered its judgment on March 20, 1998. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, provides: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Relevant portions of Alabama statutes, regulations, and rules are set forth at Pet. App. 76a-110a.

STATEMENT

1. The Tax at Issue.

Alabama imposes a franchise tax on both domestic and foreign corporations. A domestic corporation (*i.e.*, a corporation organized under the laws of Alabama) must pay

a tax "based on its capital stock" at the rate of $10 per $1,000. Ala. Code § 40-14-40.[1] Although the statute does not define "capital stock," Alabama has long applied the term to mean par value (in the case of stock with par value) or stated value (in the case of stock with no par value). *See* Stipulated Facts (hereinafter "Stip.") ¶¶ 9, 17, 56 (Pet. App. 50a, 52a, 61a).

The par or stated value of a domestic corporation's stock is determined by the corporation itself and does not represent the stock's market or book value. *See* Stip. ¶¶ 19-24 (Pet. App. 52a-53a). As the parties accordingly stipulated, an Alabama corporation "may control the amount of its domestic franchise tax . . . by assigning as the 'par value' or 'stated value' of its capital stock any value selected by it." Stip. ¶ 21 (Pet. App. 52a). Consequently, domestic corporations can (and do) minimize their franchise tax liability by assigning to their stock only a token par or stated value (for example, one cent per share). *See* Stip. ¶¶ 21-24 (Pet. App. 52a-53a); Statement of the Facts (hereinafter "Statement") 17 & n.20, 38 (Pet. App. 30a, 46a-47a).[2]

A foreign corporation's franchise tax liability is computed on a wholly different basis. It must pay a franchise tax at the rate of $3 per $1,000 of "the actual amount of [the corporation's] capital employed in this state." *See* Ala. Code § 40-14-41(a).[3] The statute defines a foreign

[1] Prior to 1984, the rate was $3 per $1,000. *See* Pet. App. 24a n.13, 27a. The years at issue in this case include 1982 through 1991.

[2] The "Statement of the Facts" is a portion of petitioners' pretrial brief that the trial court adopted in full as its own. *See* Pet. App. 21a n.7.

[3] A corporation's capital "employed in" Alabama consists of an apportioned share of its total capital, as determined by the percentage of the corporation's total property, payroll, and sales attributable to Alabama. *See generally* Ala. Code § 40-14-41(c); Ala. Franchise Tax Reg. § 810-2-3-.11 (repealed in 1992 and replaced by comparable provisions in Ala. Franchise Tax Reg. § 810-2-3-.13 (1993)).

corporation's "capital" to comprise essentially every item on the capital account of the corporation's balance sheet, "including the outstanding capital stock, surplus and undivided profits, long-term debt, certain related party debts and accelerated depreciation." Stip. ¶ 18 (Pet. App. 52a); *see* Ala. Code § 40-14-41(b)(1)-(5). A foreign corporation, unlike a domestic corporation, thus cannot exert control over its own franchise tax liability by adjusting the par or stated value of its stock. *See* Stip. ¶¶ 25-26 (Pet. App. 53a).

In sum, despite a nominally higher franchise tax rate for domestic than for foreign corporations ($10 per $1,000 of "capital stock" vs. $3 per $1,000 of "capital employed" in Alabama), and despite the inability of domestic corporations to apportion their tax base (the tax applies to the company's stock regardless of where it does business), Alabama empowers domestic corporations (but not foreign corporations) to reduce their franchise tax burden to a bare minimum simply by adjusting the par or stated value of their stock. The demonstrable result, as explained below, is that foreign corporations bear a vastly disproportionate franchise tax burden solely because they are organized under the laws of States other than Alabama.

2. The Reynolds Litigation.

In 1986, Reynolds Metals Company and General Motors Corporation brought suit in Alabama trial court, claiming that the foreign franchise tax described above violated (among other things) the Commerce and Equal Protection Clauses. Reynolds and GM argued that, because of the different tax bases used in Sections 40-14-40 and 40-14-41, Alabama's foreign franchise tax scheme discriminated against out-of-state corporations. Proceeding on summary judgment and without a fully developed record, Reynolds and GM supported their discrimination claim by pointing to evidence that the average out-of-state

corporation paid significantly more franchise tax than the average Alabama corporation.

In ruling on this motion, the trial court agreed that Sections 40-14-40 and 40-14-41 discriminated against out-of-state corporations. Noting that, in 1982 and 1983, Alabama had collected almost $94 million from 29,000 out-of-state corporations but less than $10 million from 82,000 Alabama corporations, the trial court granted summary judgment for the plaintiffs on the ground that the foreign franchise tax violated the Equal Protection Clause. *See Reynolds Metals Co. v. White*, No. CV-86-1093, slip op. at 3 (Montgomery County Cir. Ct. July 7, 1989).[4] The Alabama Court of Civil Appeals affirmed on all grounds. *See White v. Reynolds Metals Co.*, 558 So.2d 367 (Ala. Civ. App. 1989).

Just seven days after the Court of Civil Appeals rendered its decision, however, the Alabama Supreme Court, acting *sua sponte*, issued a writ of certiorari, ordered the parties to file briefs within three days, and scheduled oral argument on the third day after that. Ten days after oral argument, the court issued a decision reversing the judgment of the Court of Civil Appeals and upholding the franchise tax in all respects. *See White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990).

In rejecting both the Commerce Clause and Equal Protection Clause attacks on the franchise tax, the Ala-

[4] In light of its equal-protection holding, the court found it unnecessary to address the *Reynolds* plaintiffs' Commerce Clause claims. In a separate order, the trial court determined that, pursuant to state-law retroactivity principles, its equal-protection ruling should have prospective effect only. *See Reynolds Metals Co. v. White*, No. CV-86-1093, slip op. at 3 (Montgomery County Cir. Ct. Aug. 14, 1989). Thus, despite a clear statutory refund remedy, *see* Ala. Code §§ 40-1-11, 40-1-12, 40-1-34, 40-2-22 (repealed in 1992 and replaced by comparable provisions in Ala. Code §§ 40-2A-1, *et seq.*), the court held that the *Reynolds* plaintiffs were not entitled to a refund.

bama Supreme Court proceeded on the premise that "the ultimate question in applying either equal protection or commerce clause analysis to these facts is virtually the same." *Id.* at 382. That question, as the court saw it, was "whether the franchise tax on foreign corporations *invidiously* discriminates against them by imposing a grossly disproportionate tax on them for no other reason than to provide a competitive advantage to domestic corporations." *Id.* (emphasis in original). "[I]n enacting tax statutes," the court stated, "legislatures are not required to reach equality with mathematical precision." *Id.* Applying these standards, the court pointed to considerations that, in its view, reduced "the alleged unequal treatment of and discrimination against foreign corporations . . . to a point that no discrimination of constitutional significance exists." *Id.* at 388.

First, the court said that the plaintiffs had failed to make a sufficient showing of discrimination to support their motion for summary judgment—or, indeed, to withstand the State's cross-motion for summary judgment. In the court's view, plaintiffs' summary showing that foreign corporations on average paid more franchise tax than domestic corporations did not necessarily prove discrimination. The higher tax burden of foreign corporations would not be discriminatory at all, the court said, if foreign corporations were actually employing more capital in Alabama than were domestic corporations, a question that could not be answered on the record before it. *See id.* at 383.

Second, the court determined that Alabama's foreign franchise tax was "complementary" to Alabama's "domestic shares tax" (Ala. Code § 40-14-70)—an unrelated ad valorem property tax imposed on shareholders of domestic corporations and, in practice, typically paid by corporations on behalf of the shareholders (*see id.* §§ 40-14-70(c), 40-14-73). *See* 558 So.2d at 383. Adding the domestic shares tax to the domestic franchise tax, the

court stated, made the relative tax burdens on domestic corporations "more nearly equivalent to that of foreign corporations." *Id.* at 386. The court failed to mention that Alabama law also imposes a shares tax on Alabama residents owning stock in foreign corporations. *See* Ala. Code § 40-11-1(b)(9).

In reaching its conclusions, the Alabama Supreme Court did not have the benefit of this Court's subsequent pronouncement rejecting "a 'de minimis' defense to a charge of discriminatory taxation under the Commerce Clause," *Fulton Corp. v. Faulkner*, 516 U.S. 325, 334 n.3 (1996), or of its recent decisions narrowly circumscribing the scope of the "complementary tax doctrine." *See id.* at 333-44; *Associated Indus. of Missouri v. Lohman*, 511 U.S. 641 (1994); *Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 511 U.S. 93 (1994).[5]

3. The Proceedings Below.

a. Trial court. While the *Reynolds* case was pending before the Alabama Supreme Court, petitioner South Central Bell Telephone Company (which later merged into BellSouth Telecommunications, Inc.) brought this action challenging Alabama's foreign franchise tax in the Circuit Court for Montgomery County. Certain of South Central Bell's affiliates thereafter filed similar suits. One year later, petitioner CSX Transportation, Inc., and certain of its predecessors also separately brought actions challenging the franchise tax in the same court. The trial court consolidated all the BellSouth and CSX actions, which, in the aggregate, sought declaratory relief and refunds with respect to tax years 1982 through 1991. After extensive discovery, the court conducted a two-day bench trial in December 1994.

[5] Perhaps because of the Alabama Supreme Court's finding that the factual record did not bear out discrimination, this Court denied petitions for certiorari filed by Reynolds Metals and GM. *See* 496 U.S. 912 (1990).

At trial, the BellSouth and CSX taxpayers sought to remedy the evidentiary deficiencies on which the Alabama Supreme Court had relied in *Reynolds*—a case that had been decided on a summary judgment record in which the plaintiffs had sought to prove discrimination by showing that, on average, foreign corporations paid more franchise taxes than did domestic corporations. *First*, BellSouth and CSX introduced an expert study and supporting testimony that compared the franchise tax that domestic corporations actually paid with the franchise tax they *would have* paid if they had been foreign corporations. *See* Statement 23-24, 29 (Pet. App. 35a-36a, 40a). The evidence showed that, on average, the domestic corporations, if treated as foreign corporations, would have paid franchise taxes in an amount more than five times greater than the amount they actually paid. *See id.* at 24 (Pet. App. 36a) (percentage of discrimination ranging from 409.56% in 1988 to 509.15% in 1991).[6]

Second, petitioners introduced evidence to address the *Reynolds* court's holding that the foreign franchise tax should be treated as "complementary" to the domestic shares tax. Petitioners argued that, as a matter of law, a different and unrelated tax like the shares tax could not remedy unconstitutional discrimination. But they also showed that it should not matter: their evidence demonstrated that, on average, the sampled domestic corporations, if treated as foreign corporations, would have paid franchise taxes in an amount roughly twice as great as the combined amounts of franchise taxes and domestic shares taxes they actually paid. *See id.* at 25 (Pet. App. 36a-37a) (percentage of discrimination ranging from 109% in 1988 to 104% in 1991).

[6] The evidence of discrimination was based on data for tax years 1988 through 1991. The parties stipulated that evidence for the tax years 1988 through 1991 is representative of the other tax years at issue (1982-87). *See* Stip. ¶ 66 (Pet. App. 62a).

The Circuit Court agreed that petitioners had accomplished their objective of filling any evidentiary gaps in the *Reynolds* record: "The Court finds that the Taxpayers' evidence in this action clearly and abundantly demonstrates that the franchise tax on foreign corporations discriminates against them for no other reason than the state of their incorporation." Pet. App. 21a-22a (footnote omitted).[7] The court also agreed with petitioners' legal arguments that this Court's recent decisions had thoroughly undermined the Alabama Supreme Court's reasoning in *Reynolds* by confirming both that there is no "de minimis" exception to the Commerce Clause's ban on discrimination against interstate commerce and that discrimination caused by one state tax (like Alabama's franchise tax) cannot be offset by an unrelated state tax (like the domestic shares tax):

> [T]he Court believes that since 1989, the United States Supreme Court has made it abundantly clear that a state's tax scheme cannot impose the slightest burden on interstate commerce unless there is some reason for doing so other than economic protectionism. *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. [93], 114 S. Ct. 1395 (1994); *Associated Industries v. Lohman*, 511 U.S. [641], [114] S. Ct. [1815] (1994). In addition, the decision in *Fulton Corporation v. Faulkner*, [516] U.S. [325], 133 L.Ed.2d 796 (1996), enlightens the analysis of the complementary tax doctrine and appears to super[s]ede the reasoning of the *Reynolds* court.

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[7] The omitted footnote states: "See Taxpayers' brief filed May 17, 1994, pp. 10-39, which the Court finds to fairly state the evidence in this case and, except as otherwise indicated, the Court adopts as its own." Pet. App. 21a n.7. The portion of petitioners' trial court brief that the court adopted as its own is the "Statement of the Facts" reproduced at Pet. App. 23a-47a.

Id. at 21a. The court therefore concluded "that the franchise tax on foreign corporations violates the commerce clause of the Federal Constitution." *Id.* at 22a.

Despite that Commerce Clause ruling, the Circuit Court entered judgment against petitioners. The court said in a single unexplained sentence—for which it cited no authority—that, "based upon Alabama jurisprudence, the Taxpayer's claims are barred by *res judicata*." *Id.* at 17a. The court so held even though none of the taxpayers was a party to the *Reynolds* litigation; none had an opportunity to present evidence or argument in the *Reynolds* litigation; none was in any way affiliated with the *Reynolds* plaintiffs; none had authorized them to represent its interests; none in any way controlled the prosecution of the *Reynolds* case or shared in the plaintiffs' legal expenses; and, indeed, none was even *aware* of the *Reynolds* litigation until after the trial court's decision in that case. *See* Tr. 131-32, 192-93 (Pet. App. 69a-70a, 73a-74a).

Having concluded that the taxpayers' claims were barred by state-law res judicata principles, the Circuit Court turned to the question whether denying the taxpayers their day in court would violate their federal due process rights. The court acknowledged that, in *Richards v. Jefferson County*, 517 U.S. 793 (1996), this Court had recently invalidated a similar application of res judicata by the Alabama Supreme Court. In *Richards*, the Alabama Supreme Court had held that a decision in a prior action brought by one set of taxpayers barred an action by a second, unrelated set of taxpayers on the theory that the first set of taxpayers "adequately represented" the second, *id.* at 796; this Court reversed the Alabama Supreme Court's decision as an "extreme application of state-law res judicata principles" violative of due process, *id.* at 804. But the Circuit Court held that *Richards* was distinguishable on two grounds.

First, the court believed that petitioners here, unlike the petitioners in *Richards*, had "notice" of the prior

litigation. Pet. App. 19a. The court used the term "notice," however, in a decidedly unorthodox manner—*not* to signify notice to non-parties that their rights might be adjudicated preclusively in pending litigation, but rather to signify merely a general *awareness* of the pending litigation. Relying first on a theory of imputed knowledge, the court stated that, because petitioners are "large and sophisticated corporations," it was reasonable to assume that they "are well informed in all matters involving issues of national and state taxation, and that they stay well informed of significant pending legal actions and court decisions." *Id.* at 18a. In addition, according to the court, petitioners "admit[ted]" that, by the time they brought suit in this case, they had become aware of the trial court's decision in *Reynolds* and, in that sense, had acquired "actual notice" of that litigation. *See id.* at 18a-19a. The court did not explain the basis for its tacit conclusion that "notice"—in the sense of imputed or actual awareness of pending litigation involving unrelated parties—could by itself support the application of res judicata.

Second, the Circuit Court apparently thought that it was more reasonable here than it had been in *Richards* to conclude that the unrelated taxpayers in the earlier case adequately represented taxpayers in the later case. In support, the court noted that the "*Reynolds* taxpayers were represented by well known and excellent counsel"; that, even though "all of the precise arguments may not have been made in *Reynolds* that are presented to this Court, the *Reynolds* action and this action arise out of the same nucleus of operative facts"; that the taxpayers' basic Commerce Clause claim was "addressed and decided in *Reynolds*"; that "[t]here was not a significant lapse of time between the *Reynolds* litigation and these . . . actions"; that "[t]here is no conflict between the interests of the *Reynolds* taxpayers and the Taxpayers in this

action"; and that petitioners were "represented by the same attorney." *Id.* at 19a.[8]

b. Alabama Supreme Court. In their appeal to the Alabama Supreme Court, petitioners challenged the Circuit Court's res judicata determination and, among other things, reiterated their Commerce Clause objections to the franchise tax. Nearly a year later, the Alabama Supreme Court, in a five-to-four decision, issued the following order:

> PER CURIAM.
>
> AFFIRMED. NO OPINION.
>
> See Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P., and *White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989), cert. denied, *Reynolds Metals Co. v. Sizemore*, 496 U.S. 912 (1990).

Pet. App. 1a.[9]

One member of the majority (Justice Maddox) did attempt "to explain why" the trial court's decision should be affirmed. *Id.* In Justice Maddox's view, the critical fact was a letter that counsel for the BellSouth taxpayers

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[8] The court was apparently referring to the fact that Professor Walter Hellerstein, co-counsel to petitioners in this case, also represented the *Reynolds* plaintiffs. The court failed to say that Professor Hellerstein represented the *Reynolds* plaintiffs only in seeking review in this Court, not in any state-court proceedings. The court also did not explain how Professor Hellerstein could possibly have protected petitioners' interests in the *Reynolds* litigation, particularly when Professor Hellerstein did not even become involved in the *Reynolds* litigation until after the evidentiary failure that the Alabama Supreme Court saw in *Reynolds* had already occurred.

[9] Rule 53(a) of the Alabama Rules of Appellate Procedure provides in pertinent part: "The Supreme Court . . . may affirm a judgment or order of a trial court without an opinion if the court determines: (1) That an opinion in the case would serve no significant precedential purpose; and (2) That . . . (F) [t]he court, after a review of the record and the contentions of the parties, concludes that the judgment or order was entered without an error of law." Pet. App. 108a.

sent to the Circuit Court in January 1990 (after the Alabama Supreme Court had issued its decision in *Reynolds*) requesting that the court hold the case in abeyance pending final disposition of the *Reynolds* litigation. *See id.* at 3a-4a. The letter stated:

> [B]oth the taxpayer and the State Department of Revenue desire that further proceedings with regard to this appeal be held in abeyance pending a final disposition of the *Reynolds* and [*GM*] cases, whether that be at the rehearing stage before the Alabama Supreme Court or by judicial review in the U.S. Supreme Court. However, if either party desires to proceed at a later date, with the Court's permission, this case would be activated.

Id. at 65a.

Justice Maddox interpreted this routine abeyance request to mean "that both parties advised [the trial court] that they were going to be bound by the final decision in the *Reynolds Metals* case," *id.* at 4a; he therefore concluded that "the trial court did not err in holding that the decision in *Reynolds Metals* precluded the claims of these particular taxpayers," *id.* at 6a. Justice Maddox gave no reason for inferring that a litigant waives the right to pursue its own case when it asks a court to hold its case in abeyance pending the disposition of another case. Nor did Justice Maddox explain how the BellSouth taxpayers' action could bind the CSX taxpayers, who did not even file their lawsuits until a year after counsel for the BellSouth taxpayers wrote the letter in question. As for this Court's decision in *Richards*, Justice Maddox summarily dismissed it, observing without elaboration that "[t]he operative facts of this case relating to the Due Process Clause argument are . . . wholly different." *Id.*

Three of the four dissenting Justices joined an opinion by Justice See concluding that "the taxpayers' claims are not barred by the doctrine of res judicata." *Id.* at 7a.[10]

[10] Justice Cook dissented without opinion.

The dissent observed that the doctrine simply does not apply where, as here, "we are dealing not only with different tax years, but also with different taxpayers." *Id.* at 8a. The dissent further noted that "the doctrine of res judicata does not apply when the judgment pleaded as an estoppel is based upon controlling decisions subsequently repudiated by supervening decisions." *Id.* That principle was applicable here, the dissent explained, because this Court "has rendered intervening decisions that repudiate the *Reynolds Metals* rationale." *Id.*

On the merits, the dissent found it "inescapable that the Alabama franchise tax scheme runs afoul of the design of the Constitution of the United States to make of this nation a single market." *Id.* at 7a. The dissent noted that the domestic franchise tax applies only "to the easily manipulable base of par value," whereas the foreign franchise tax applies "to the much larger base of par value plus other items such as surplus and long-term debt." *Id.* at 12a-13a. Because "[i]t is not facially apparent" that the much greater foreign tax base "merely equalizes the burden produced by the application of" the higher tax rate applicable to domestic corporations (1% vs. 0.3%), the dissent found that "the Alabama franchise tax facially discriminates against interstate commerce." *Id.* Recognizing that this Court has rejected a "de minimis" exception to Commerce Clause principles, the dissent added that "arguments over the degree of the discrimination do not affect this characterization." *Id.* at 13a.

The dissent was also unpersuaded by the State's defense that the discriminatory foreign franchise tax could be justified as a "compensatory tax" for other levies imposed on domestic corporations. Though recognizing that the Alabama Supreme Court had "accepted a similar argument in *Reynolds Metals*," *id.*, the dissent observed that this Court "has since clarified and narrowed the definition of compensatory tax," *id.* (citing *Fulton Corp.*

v. Faulkner, 516 U.S. 325, 332-33 (1996), and *Oregon Waste Sys., Inc.* v. *Department of Environmental Quality*, 511 U.S. 93, 102 (1994)).

In particular, the dissent concluded that Alabama's franchise tax failed two of this Court's criteria for a permissible "compensatory tax." First, the dissent stated, the State had failed to demonstrate that the "discriminatory interstate tax . . . . roughly approximates, but does not exceed," the taxes on intrastate commerce for which it allegedly compensates. *Id.* at 13a-14a. To the contrary, the dissent noted, "the Taxpayers offer substantial evidence supporting the proposition that the foreign franchise tax exceeds any intrastate burden." *Id.* at 14a. Second, the dissent concluded that "[t]he State also fail[ed] to show that the events taxed by Alabama's intrastate taxes and the interstate tax are 'substantially equivalent.'" *Id.* (citing *Fulton*, 516 U.S. at 333, 336-38). In contrast to sales and use taxes, which are complementary because they are functionally equivalent to one another, the foreign franchise tax (a tax on the corporation's privilege of doing business) and the domestic shares tax (a tax on shareholders' property) "cannot be viewed as 'mutually exclusive proxies' for each other." *Id.* (citing *Fulton*, 516 U.S. at 333, 338-40).

REASONS FOR GRANTING THE PETITION

In the words of the dissenting Justices below, "it is inescapable" that Alabama's foreign franchise tax violates the Commerce Clause. This Court's decisions in *Fulton*, *Associated Industries*, and *Oregon Waste* make utterly clear (if there ever was doubt) that the grounds on which the Alabama Supreme Court based its 1989 *Reynolds* decision—that de minimis discrimination is not unlawful and that Alabama's foreign franchise tax is a permissible "complementary tax"—can no longer pass legal muster. Yet, Alabama to this day continues to levy and collect its foreign franchise tax—even though every judge who

expressly addressed the question in this case concluded that the tax is plainly unconstitutional.

The decision below makes clear that the Alabama Supreme Court is simply unwilling to apply this Court's constitutional rulings and to rectify the unlawful state of affairs. Perhaps tacitly acknowledging that nothing can be said in defense of the tax's constitutionality, the court rejected petitioners' Commerce Clause challenges in a no-opinion affirmance. That the affirmance may actually rest on a res judicata rather than a Commerce Clause holding[11] makes the Alabama Supreme Court's intransigence, if anything, all the more troublesome: any such holding must be viewed as an "extreme applicatio[n] of the doctrine of res judicata" that itself flies in the face of this Court's recent due process precedent. *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996). Either way, the decision below squarely "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Review is required to bring this recalcitrance to an end.

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[11] The decision below seems open to different readings. The court's "no opinion" affirmance cited Rule 53(a)(1) and (2)(F) of the Alabama Rules of Appellate Procedure, as well as the *Reynolds* decision. On the one hand, the court may have reached the merits of petitioners' Commerce Clause claims, may have believed that *Reynolds* (cited only as precedent) was somehow still good law, and may therefore have concluded (in the words of Rule 53(a)(2)(F)) that the trial court's "judgment" (in the sense of its result) had been "entered without an error of law." On the other hand, the Alabama Supreme Court's affirmance may reflect a res judicata holding. For one thing, if it had reached the merits, one might have expected the court not to remain silent in the face of a trial court opinion explicitly stating that the franchise tax failed Commerce Clause review. For another thing, Justice Maddox (whose fifth vote was necessary to make a majority) based his separate opinion on res judicata and expressly stated that he did not reach the merits of petitioners' Commerce Clause claims. *See* Pet. App. 6a. Because it is impossible to determine with certainty whether the no-opinion affirmance was based on the merits of petitioners' claims, on res judicata, or on both, this petition challenges both grounds.

These "compelling reasons" for granting this petition (Sup. Ct. R. 10) are all the more cogent given the nature of the underlying dispute. Because "the Commerce Clause's overriding requirement of a national 'common market'" (*Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977)) historically has required federal judicial protection, and because the Tax Injunction Act (28 U.S.C. § 1341) forecloses access to the lower federal courts to challenge the lawfulness of state taxes, this Court has long exercised its discretionary certiorari jurisdiction mindful of its role as "the special guardian of the Commerce Clause," *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 101 n.3 (1948) (Frankfurter, J., dissenting).

More generally, this Court has been vigilant to ensure that States do not place artificial obstacles in the path of taxpayers seeking to recover, through established procedures, state taxes levied in violation of federal law. This Court has ruled, for example, that state courts may not deny relief from unlawful state tax schemes on the ground that the constitutional decisions of this Court, though applied to the parties before this Court, may nonetheless be given only prospective effect in the state courts. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). Similarly, this Court has prevented state courts from denying a meaningful post-deprivation remedy to taxpayers who paid an unconstitutional state tax under legal compulsion. *See McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). And the Court has foreclosed "bait and switch" tactics, under which States, having held out an established post-deprivation refund remedy for unlawfully imposed taxes, declared only after the disputed taxes were paid that no such remedy is available. *See Newsweek, Inc. v. Florida Dep't of Revenue*, 118 S. Ct. 904 (1998) (per curiam); *Reich v. Collins*, 513 U.S. 106 (1994).

Here, Alabama, unable to erect an obstacle of plausible legality, appears to have devised a hurdle that this Court—in a unanimous, recent, and unambiguous decision—has already prohibited this very State from using. Given the Alabama court's unwillingness to accede to that ruling, this Court should now grant review to determine (a) that the Alabama Supreme Court cannot constitutionally deprive petitioners of their day in court on the basis of extreme state-law res judicata principles, (b) that Alabama's facially discriminatory franchise tax scheme violates the Commerce Clause, and (c) that petitioners are entitled to meaningful backward-looking relief from the unlawfully exacted franchise taxes.[12]

I. DUE PROCESS DOES NOT PERMIT AN EXTREME APPLICATION OF RES JUDICATA TO BLOCK A CHALLENGE TO A PATENTLY UNCONSTITUTIONAL STATE TAX.

To the extent that the Alabama Supreme Court rested its no-opinion affirmance on state-law principles of res judicata, it has blocked petitioners' challenges to Alabama's patently unconstitutional franchise tax by throwing in peti-

[12] Under the circumstances, "summary disposition on the merits" pursuant to Rule 16.1 may be appropriate. *See, e.g., Newsweek, Inc. v. Florida Dep't of Revenue*, 118 S. Ct. 904 (1998) (per curiam) (summarily vacating Florida decision in which state court had denied tax refund relief using the same "bait and switch" approach previously condemned in *Reich v. Collins*, 513 U.S. 106 (1994)). This is so because the decision below "is clearly erroneous under [this Court's] precedents," *Mazurek v. Armstrong*, 117 S. Ct. 1865, 1868 (1997) (per curiam); the error is "of constitutional dimension," R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 252 n.83 (7th ed. 1993); the error unquestionably "has led to an incorrect result," *Torres-Valencia v. United States*, 464 U.S. 44, 44 (1983) (Rehnquist, J., dissenting); "the facts are not in dispute," *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting); and there is no need to fear showing disrespect to a "carefully reasoned decision," *Oregon State Penitentiary v. Hammer*, 434 U.S. 945, 947 (1977) (Stevens, J., dissenting).

tioners' way a procedural obstacle that *itself* directly conflicts with this Court's recent and unambiguous precedent. In *Richards v. Jefferson County*, 517 U.S. 793 (1996), this Court just two Terms ago unanimously rebuffed an attempt by the same Alabama Supreme Court to interpose an equally far-fetched res-judicata bar to a lawsuit challenging a different Alabama tax as violative of the federal constitution. This case is indistinguishable from *Richards*. It, too, represents an impermissible infraction of "the traditional rule that an extreme application of state-law res judicata principles violates the Federal Constitution." *Id.* at 804.

1. In *Richards*, the Alabama Supreme Court had held that a suit challenging an Alabama tax under the Due Process and Equal Protection Clauses of the Fourteenth Amendment was barred by res judicata in light of an earlier decision, *Bedingfield v. Jefferson County*, 527 So.2d 1270 (1988), in which that court had rejected a similar challenge to the same tax brought by different parties. Even though the *Richards* plaintiffs had not been parties to the *Bedingfield* litigation, the Alabama Supreme Court held that they were bound by that decision. According to the Alabama Supreme Court, "the taxpayers in *Bedingfield* adequately represented [the taxpayers in *Richards*] because their respective interests were essentially identical." 517 U.S. at 796 (internal quotation marks omitted).

This Court held that setting up *Bedingfield* as a bar denied the *Richards* plaintiffs their rights under the federal due process guarantee. *See id.* at 797. At the outset, the Court reiterated the bedrock principle that the Due Process Clause generally permits state courts to hold a litigant bound by an earlier decision only if that litigant was a party to the earlier case. *See id.* at 797-98; *see also Hansberry v. Lee*, 311 U.S. 32, 40 (1940). The Court acknowledged that the rule may be different where, for example, there is a guardian-ward or trustee-beneficiary relationship, there is a "class or representative sui[t]," or

there is "a special remedial scheme . . . as for example in bankruptcy or probate." 517 U.S. at 798-99 (internal quotation marks omitted). But no such exception applied in *Richards*.

And the Court rejected Alabama's argument that litigants may be bound whenever they were "adequately represented" in earlier litigation. *Id.* at 799-802. At the outset, the Court called "troubling" the fact that the *Richards* plaintiffs had not been provided with "any notice that a suit was pending which would conclusively resolve their legal rights." *Id.* at 799. Moreover, the Court said, even assuming that "adequate representation" could ever "cure a lack of notice," the prior proceeding would "at least have to be so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." *Id.* at 801 (internal quotation marks omitted).

The *Bedingfield* proceeding, the Court held, simply did not answer that description. The Court noted that the *Bedingfield* plaintiffs "did not sue on behalf of a class," that "their pleadings did not purport to assert any claim against or on behalf of any nonparties," and that "the judgment they received did not purport to bind any county taxpayers who were nonparties." *Id.* Thus, the Court applied "the traditional rule that an extreme application of state-law res judicata principles violates the Federal Constitution." *Id.* at 804. The Court concluded that "[a] state court's freedom to rely on prior precedent in rejecting a litigant's claims does not afford it similar freedom to bind a litigant to a prior judgment to which he was not a party," and that this "general rule clearly applies when a taxpayer seeks a hearing to prevent the State from subjecting him to a levy in violation of the Federal Constitution." *Id.* at 805.

2. The Alabama Supreme Court's decision in the present case is at least as "extreme [an] application of state-

law res judicata principles" as the Alabama Supreme Court decision reviewed in *Richards*, and it equally "violates the Federal Constitution." *Id.* at 804. As in *Richards*, none of the petitioners here was given notice that the *Reynolds* litigation "would conclusively resolve their legal rights." *Id.* at 799. Similarly, the *Reynolds* proceeding was not "so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." *Id.* at 801 (internal quotation marks omitted). Moreover, as in *Richards*, the *Reynolds* plaintiffs "did not sue on behalf of a class" or "purport to assert any claim . . . on behalf of any nonparties," and the *Reynolds* judgment "did not purport to bind any . . . nonparties." *Id.*

The attempts by Justice Maddox and the trial court to distinguish *Richards* are without substance. Contrary to Justice Maddox's assertion, the letter in which the BellSouth taxpayers (joined by the State Department of Revenue) asked the trial court to hold the litigation in abeyance in no way suggests that the BellSouth taxpayers ever agreed, either expressly or by implication, to be bound by the *Reynolds* decision. Instead, the letter (reprinted in full at Pet. App. 65a-66a) was a routine effort to conserve the resources of the trial court and the parties: if this Court had granted review in *Reynolds* and had invalidated the tax on the slender record developed in that case, it would have been unnecessary for the BellSouth taxpayers to develop the full record eventually assembled in this case. And it is simply a mystery how BellSouth's innocuous abeyance request can possibly be understood, under any coherent theory, to foreclose the CSX taxpayers, who did not even *file* their actions until nearly a year later.

Quite apart from the fact that nothing in the letter can plausibly be read to manifest any intention to bind the taxpayers to *Reynolds*, it is utterly unrealistic to attribute

such an intention to petitioners. It would be odd enough for petitioners voluntarily to bind themselves to the outcome of litigation to which they were not a party, waiving any opportunity to cure defects in the *Reynolds* record without any offsetting benefit. But the timing of the abeyance request would make this odder still. The BellSouth taxpayers sent the abeyance letter *after* the Alabama Supreme Court had already rejected the *Reynolds* plaintiffs' challenges. It is inconceivable that petitioners would willingly have tied their fate to that of litigants who had already suffered a loss at the highest level of the Alabama court system.

The trial court's "distinctions" (not endorsed even by Justice Maddox) are equally insubstantial. As for the trial court's "notice" point, the undisputed record evidence shows that petitioners did not become aware of the *Reynolds* litigation until after the trial court's decision in that case. *See supra*, p. 11.[13] And it is neither realistic nor constitutionally tolerable to impute knowledge to petitioners merely because they are "large and sophisticated corporations." Pet. App. 18a. In any event, mere "knowledge" of a case cannot be equated with "notice that a suit was pending which would conclusively resolve [petitioners'] legal rights." 517 U.S. at 799. As this Court stated in *Richards*, "[t]he general rule is that the law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *Id.* at 800 n.5 (internal quotation marks and brackets omitted).

The trial court also suggested that the *Reynolds* plaintiffs "adequately represented" petitioners, noting that accomplished attorneys represented the *Reynolds* plaintiffs;

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[13] Binding petitioners to the outcome in the *Reynolds* case is thus particularly offensive. The Alabama Supreme Court based its rejection of the *Reynolds* plaintiffs' claims on evidentiary failure. By the time petitioners learned of the *Reynolds* litigation, that failure had already occurred.

that *Reynolds* arose from the "same nucleus of operative facts"; that petitioners' basic claim was "addressed and decided in *Reynolds*"; that there was no "significant lapse of time" since *Reynolds;* that the *Reynolds* plaintiffs had no "conflict of interest" with petitioners; and that the same attorney who represented the *Reynolds* plaintiffs also represented petitioners. With the possible exception of the overlap of attorneys, however, each of these considerations applied equally in the *Richards* case. And to say that "[t]axpayers are represented by the same attorney" as the *Reynolds* plaintiffs significantly overstates the case: Professor Hellerstein (one of petitioners' counsel) represented the *Reynolds* plaintiffs only as co-counsel in seeking certiorari in this Court. *See* note 8, *supra.* In any event, overlap of attorneys is both legally and logically irrelevant.[14]

II. ALABAMA'S TAX PLAINLY VIOLATES THE COMMERCE CLAUSE.

Nor can there be any serious debate about the proper resolution of the merits of this case: Alabama's franchise tax unquestionably discriminates against interstate commerce in violation of the Commerce Clause. Every judge who expressly addressed the question in this case so concluded. The trial judge found that the tax violated the Commerce Clause because "the Taxpayers' evidence in this action clearly and abundantly demonstrates that the franchise tax on foreign corporations discriminates against them for no other reason than the state of their incorporation." Pet. App. 21a-22a (footnote omitted). The three Alabama Supreme Court Justices who joined an opinion on the merits likewise concluded that "it is inescapable that the Alabama franchise tax scheme runs afoul of the design of the Constitution of the United States to make

[14] *See generally Collins v. E.I. DuPont de Nemours & Co.*, 34 F.3d 172, 178-79 (3d Cir. 1994) (Becker, J.) ("[t]he fact that the plaintiff's attorney took part in a prior, similar action is irrelevant unless there is evidence that the plaintiff was, through his or her attorney, actually participating in the prior suit").

of this nation a single market." *Id.* at 7a. And the deafening silence of the five Justices who voted to affirm may be the surest sign that Alabama's foreign franchise tax cannot be defended against Commerce Clause attack.

1. Alabama's franchise tax scheme produces a paradigmatic violation of the Commerce Clause by "favor[ing] domestic corporations over their foreign competitors." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 (1996). By imposing a tax on domestic corporations measured by the par or stated value of their capital stock, Alabama permits domestic corporations effectively to dictate their own franchise-tax liability, a freedom that those corporations naturally exploit to reduce their franchise tax payments to a minimal amount. *See* Stip. ¶¶ 21-24 (Pet. App. 52a-53a). In contrast, by imposing a tax on foreign corporations measured by actual capital employed in the State, Alabama precludes foreign corporations from doing the same. *See* Stip. ¶¶ 25-26 (Pet. App. 53a). Thus, the franchise tax statute facially discriminates against interstate commerce and thereby violates the "virtually *per se* rule of invalidity" that this Court applies to facially discriminatory taxes. *See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1598 (1997) (striking down state property-tax exemption for charitable institutions that was limited to institutions serving principally state residents); *Fulton*, 516 U.S. at 331 (invalidating property tax on "intangibles" that taxed corporate stock only to the extent that the issuing corporation engaged in out-of-state activity); *Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 511 U.S. 93, 100 (1994) (condemning tax on in-state disposal of out-of-state waste that was higher than tax on in-state disposal of in-state waste).

The discrimination that is plain on the face of Alabama's franchise tax statute is equally evident in its application. As the trial court found, domestic corporations

would have been saddled with a franchise tax burden more than five times greater than what they actually paid if they had been incorporated in any other State. *See* Pet. App. 36a; notes 2 & 7, *supra*. It follows that Alabama's franchise tax "in its practical operation work[s] discrimination against interstate commerce," *Best & Co. v. Maxwell*, 311 U.S. 454, 456 (1940), and therefore violates the Commerce Clause prohibition against state taxes that have a "discriminatory effect," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984).

2. In light of the clear discrimination worked by Alabama's franchise tax (both by its terms and in effect), the only remaining question is whether the discriminatory levy may be rescued from constitutional attack on the theory—seized upon by the *Reynolds* court, *see* 558 So.2d at 386—that it is a so-called "complementary tax" needed to compensate for some burden imposed disproportionately on intrastate commerce. The answer to that question, under this Court's decisions, is by now entirely free from doubt: the complementary tax defense cannot save Alabama's discriminatory franchise tax from condemnation under the Commerce Clause.

In a series of decisions handed down after *Reynolds*, this Court has carefully delineated the scope of the complementary tax doctrine, articulating three requirements that must be met before a court may excuse otherwise unconstitutional discrimination: (1) the State must identify an intrastate tax burden for which the discriminatory tax attempts to compensate; (2) the tax on interstate commerce must roughly approximate—but not exceed—the amount of the tax on intrastate commerce; and (3) the events on which the interstate and intrastate taxes are imposed must be "substantially equivalent," *i.e.*, they must be sufficiently similar in substance to serve as mutually exclusive proxies for each other. *Oregon Waste*, 511 U.S.

at 103; *Associated Indus. of Missouri v. Lohman*, 511 U.S. 641, 648 (1994); *Fulton*, 516 U.S. at 332-33.

The State cannot tenably defend its franchise tax under this test: even assuming that the domestic shares tax could qualify as an intrastate tax burden for which the discriminatory franchise tax purports to compensate, the State cannot satisfy either of the latter two criteria. *First*, even if one takes account of the domestic shares tax, domestic corporations still pay in franchise tax and domestic shares tax combined only about half the amount they would pay in franchise tax alone if they were incorporated elsewhere. *See* Statement 25 (Pet. App. 36a-37a). The tax on interstate commerce therefore cannot "be shown roughly to approximate—but not exceed—the amount of the tax on intrastate commerce." *Oregon Waste*, 511 U.S. at 103. Rather, as in *Associated Industries*, "[t]he resulting disparity is incompatible with what [this Court has] termed the 'strict rule of equality adopted in [*Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937)].'" 511 U.S. at 649.

Second, the domestic shares tax and the franchise tax are not imposed on substantially equivalent events. The shares tax is an ad valorem personal property tax (much like a property tax on real estate), which taxes shareholders based on the value of their stock holdings. In contrast, the franchise tax is an excise tax, which taxes the corporation (not the shareholder) for the privilege of corporate existence or doing business. *Compare* Ala. Code § 40-14-70 *with* Ala. Code § 40-14-41. Alabama thus imposes the two levies not only on different events, but also on different taxpayers. Accordingly, the corporate franchise tax and the domestic shares tax cannot be viewed as complementary because the two taxes are not "sufficiently similar in substance to serve as mutually exclusive proxies for each other." *Oregon Waste*, 511 U.S. at 103 (internal quotation marks and brackets omitted); *see also Fulton*, 516 U.S. at 340 n.6 ("incidence upon the same

class of taxpayers is a necessary condition for a finding that two taxes are compiementary").[15]

III. PETITIONERS ARE ENTITLED TO MEANINGFUL BACKWARD-LOOKING RELIEF.

Relying on *Reynolds*, the trial court also stated that, even if res judicata did not bar petitioners' Commerce Clause claims, "the Court would hold that the relief to be afforded the Taxpayers in this case is prospective only," noting that "there are forms of relief to cure a constitutional violation in tax cases of this nature other than ordering a refund." Pet. App. 22a. Because the Alabama Supreme Court wrote no opinion, it is unclear whether that court meant to endorse this statement. Although a retroactivity or remedy-related holding could not by itself account for the Alabama Supreme Court's result,[16] it is theoretically possible that the court's no-opinion affirmance reflected an alternative holding with respect to petitioners' refund claims. *See* note 11, *supra*.

If that was in fact the case, the Alabama Supreme Court unquestionably erred. It is now crystal clear that a decision announcing a rule of federal law ordinarily "must be given full retroactive effect by all courts adjudicating federal law," and that "[t]he Supremacy Clause . . . does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retro-

[15] If the domestic shares tax is "complementary" to anything, it is to the foreign shares tax of Alabama Code § 40-11-1(b)(9). Like its domestic counterpart, the foreign shares tax is imposed on shareholders (not corporations), and is collected by county governments (not the State). *See generally* Statement 22 (Pet. App. 34a).

[16] The trial court's judgment, affirmed by the Alabama Supreme Court, dismissed petitioners' complaints outright. Those complaints had demanded not only retrospective refunds, but also prospective declaratory relief. Because the unavailability of backward-looking relief cannot have justified dismissal of petitioners' request for declaratory relief, the Alabama Supreme Court's affirmance cannot have rested solely on that unstated ground.

activity under state law." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 96, 100 (1993). It is equally clear that where, as here, a State has long held out a statutory refund remedy,[17] the State may not engage in "bait and switch" tactics by holding in hindsight that a pre-deprivation remedy is a taxpayer's only available recourse for unlawful taxation. *See Newsweek, Inc. v. Florida Dep't of Revenue*, 118 S. Ct. 904 (1998) (per curiam); *Reich v. Collins*, 513 U.S. 106, 113-14 (1994). It follows that, because the Alabama franchise tax is plainly invalid under "established principles of Commerce Clause jurisprudence" (*McKesson*, 496 U.S. at 31 n.15), petitioners are indisputably entitled to a backward-looking remedy under Alabama's post-payment refund procedures.[18]

[17] *See* Ala. Code §§ 40-1-11, 40-1-12, 40-1-34, 40-2-22 (repealed in 1992 and replaced by comparable provisions in Ala. Code §§ 40-2A-1, *et seq.*).

[18] Although this Court may conclude that the question is best addressed in the first instance by the Alabama Supreme Court on remand, it would certainly not be inappropriate for this Court to reach the issue. This Court has sometimes remanded so that a state court could consider in the first instance whether a refund of unlawfully collected taxes was the appropriate post-deprivation remedy, *see, e.g., McKesson*, 496 U.S. at 39-41, 51-52; *Associated Indus.*, 511 U.S. at 656, but its decisions in *Newsweek* and *Reich* make clear that, on remand, there would be no tenable basis for the Alabama Supreme Court to deny petitioners refunds. As in *Newsweek* and *Reich*, therefore, the Court may properly dispose of the remedial question without a remand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1997-98

1960591

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*

v.

STATE OF ALABAMA AND STATE DEPARTMENT OF REVENUE

Appeal from Montgomery Circuit Court
(CV-89-2600, 90-1591, 90-1711, 90-2555, 90-2556, 90-2557, 90-2558, 91-397, 91-1079, and 91-2151)

PER CURIAM.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P., and *White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989), cert. denied, *Reynolds Metals Co. v. Sizemore*, 496 U.S. 912 (1990).

Hooper, C. J., and Almon, Shores, and Houston, JJ., concur.

Maddox, ., concurs specially.

Kennedy, Cook, Butts, and See, JJ., dissent.

MADDOX, JUSTICE (concurring specially).

Although I agree that the judgment of the trial court is due to be affirmed, I write separately to explain why I have reached that conclusion, especially in view of the arguments raised by the taxpayers.

This case originated as a challenge by South Central Bell Telephone Company ("Bell") of an assessment of franchise tax liability against it by the Alabama Department of Revenue. On December 15, 1989, Bell filed in the Montgomery County Circuit Court a notice of appeal and a complaint and petition for judicial review of the assessment. On November 29, 1990, Judge William R. Gordon ordered that the Bell case be consolidated with similar actions that had been filed recently by several of Bell's sister corporations.[1] Both before and after this consolidation, all the plaintiffs were represented by the same attorney.[2]

On December 13, 1990, CSX Transportation, Inc., filed several actions challenging assessments of franchise tax liability, on essentially the same grounds that had been raised by Bell. CSX was represented in each of those actions by the same attorney representing Bell and its sister corporations. On May 28, 1992, upon motion by all the plaintiffs, Judge Gordon ordered the consolidation of the Bell and CSX actions.

At the trial level, the State contended, as it does here, that Bell and CSX should be estopped from litigating this case, because of the preclusive effect of this Court's decision in *White v. Reynolds Metals Co.*, 558 So. 2d 373 (Ala. 1989). In *Reynolds Metals*, this Court, with an

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[1] These included: BellSouth Corporation; BellSouth Services, Inc.; BellSouth Financial Services Corporation; BellSouth Advertising & Publishing Company; BellSouth Resources, Inc.; Alabama Cellular Services, Inc.; Sunlink, Inc.; and TechSouth, Inc.

[2] I note that, according to the record, the same attorney represented South Central Bell; BellSouth Corporation; BellSouth Services, Inc.; BellSouth Financial Services Corporation; BellSouth Advertising & Publishing Company; BellSouth Resources, Inc.; Alabama Cellular Services, Inc.; SunLink, Inc.; and TechSouth, Inc., before the trial court. Further, the same attorney represented CSX Transportation, Inc., in the cases it filed; see *infra*. That attorney continued to represent all the plaintiffs in this consolidated case through proceedings before the trial court, and he, along with additional counsel, continues to represent the plaintiffs before this Court.

opinion concurred in by every member of the Court as it was constituted at that time, concluded that the franchise tax, as applied to foreign corporations, did not violate the United States Constitution. Subsequently, the United States Supreme Court denied certiorari review of this Court's decision. *Reynolds Metals Co. v. Sizemore*, 496 U.S. 912 (1990). Consequently, the final decision in *Reynolds Metals* was adverse to the taxpayer in *Reynolds Metals* and was adverse to the taxpayers in this case. The State claims that the decision of this Court in the *Reynolds Metals* case, and the refusal of the Supreme Court of the United States to review it, preclude both Bell and CSX from claiming that a different result should be reached in this case.

Because the proceedings in *Reynolds Metals* and the early stages of this litigation occurred during the same period, and because that chronological interrelatedness partially informs my conclusions regarding this case, I set out some of that chronology. The *Reynolds Metals* case was filed before Judge Gordon several months before Bell filed its action, and on July 7, 1989, Judge Gordon entered an order holding that Alabama's franchise tax, as applied to foreign corporations, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Shortly thereafter, on November 28, 1989, the Court of Civil Appeals affirmed the judgment of the trial court. See *White v. Reynolds Metals Co.*, 558 So. 2d 367 (Ala. Civ. App. 1989). Approximately three weeks later, Bell filed the action, later consolidated with actions by both CSX and the related BellSouth companies, that is now before this Court.

On January 19, 1990, approximately one month after filing its notice of appeal, Bell, through its attorney, Walter R. Byars, asked the trial court to place its case on the "administrative docket" pending the outcome of the *Reynolds Metals* action. Mr. Byars wrote:

> "[B]oth the taxpayer and the State Department of Revenue desire that further proceedings with regard

to this appeal be held in abeyance pending a final disposition of the *Reynolds* and *GMAC* cases, whether that be at the rehearing stage before the Alabama Supreme Court or by judicial review in the U.S. Supreme Court. However, if either party desires to proceed at a later date, with the Court's permission, this case would be activated."

Judge Gordon subsequently placed the case on his administrative docket. It appears to me, from this letter, that both parties advised Judge Gordon that they were going to be bound by the final decision in the *Reynolds Metals* case, and that either party could proceed further only with the permission of the trial court. In short, it appears to me that the parties agreed that the final decision in *Reynolds Metals* would be controlling.

To clarify the relationship of these cases, I set out the following brief timeline:

7/7/89	Judge Gordon, in the *Reynolds Metals* case, enters an order holding that Alabama's foreign franchise tax was unconstitutional.
11/28/89	The Court of Civil Appeals affirms the trial court's *Reynolds Metals* judgment.
12/15/89	South Central Bell files its notice of appeal in *Bell*.
12/21/89	This Court reverses the judgments of the trial court and the Court of Civil Appeals in *Reynolds Metals*.
1/12/90	This Court denies rehearing in *Reynolds Metals*.
1/19/90	Bell and the State Department of Revenue file a joint request with the trial court to place *Bell* on its administrative docket, pending the final resolution of *Reynolds Metals*.
1/23/90	Judge Gordon places *Bell* on his administrative docket.
6/4/90	The United States Supreme Court denies certiorari review in *Reynolds Metals*.

8/?/90	Complaint is filed by BellSouth Corporation; BellSouth Services, Inc.; BellSouth Financial Services Corporation; BellSouth Advertising & Publishing Company; BellSouth Resources, Inc.; Alabama Cellular Services, Inc.; Sunlink, Inc.; and TechSouth, Inc. (collectively, "BellSouth"). This complaint was filed by the same lawyer representing Bell.
11/29/90	Judge Gordon orders consolidation, upon motion of the plaintiffs, of the *Bell* and *BellSouth* cases (hereinafter those cases are called *"Bell"*).
12/13/90	Several notices of appeal and complaints are filed in the Montgomery County Circuit Court by CSX, challenging foreign franchise tax assessments for various tax years. (Same lawyer as in *Bell*.)
05/28/92	Judge Gordon orders consolidation of *Bell* with the CSX cases. (Hereinafter those cases are called *"Bell"*).

The taxpayers contend that they are not precluded from litigating this action now. They rely on *State v. Delaney's, Inc.*, 668 So. 2d 768 (Ala. Civ. App. 1995) (Court of Civil Appeals held that the doctrine of claim preclusion does not apply in tax cases involving different tax years and that the doctrine of issue preclusion does not apply where the legal landscape has been altered). I am not unaware of the taxpayers' arguments that neither claim preclusion nor issue preclusion can apply in this case. While I do not necessarily disagree with the reasoning of *Delaney's* and the precedents upon which it is based, I believe this present case presents an exception to the principles of law set out in that case.

In this case it appears to me that the actions of the taxpayers show that each of them was aware of the *Reynolds Metals* litigation and that each realized that its claims were dependent on the final resolution of *Reynolds Metals*. Although I realize that the United States Supreme Court's denial of certiorari review does not necessarily

mean that the Court agrees with the conclusion reached by a lower Court,[3] and although I realize that the Supreme Court has released some opinions that could be interpreted as indicating a change in that Court's view of the constitutionality of state taxes such as that at issue in this case, the fact remains that the Supreme Court refused to review this Court's decision in *Reynolds Metals*, and that, as of today, *Reynolds Metals* remains the law.

In my consideration of the trial court's disposition of this case, I find no reversible error. All the cases that were eventually consolidated were pending before Judge Gordon, and they all involved the same counsel and the same issues. Further, Bell specifically requested that its case be held in abeyance until *Reynolds Metals* was decided. In light of these facts, Judge Gordon concluded that the taxpayers were estopped from arguing that *Reynolds Metals* did not govern this matter. I cannot hold that his conclusion amounted to reversible error. I also do not believe that the trial court's holding that the taxpayers are estopped to assert their rights violates their rights under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, in view of the holding in *Richards v. Jefferson County*, 517 U.S. 793 (1996). The operative facts of this case relating to the Due Process Clause argument are, in my opinion, wholly different.

In concluding that the trial court did not err in holding that the decision in *Reynolds Metals* precluded the claims of these particular taxpayers, I do not address the taxpayers' argument that cases decided by the United States Supreme Court since *Reynolds Metals* require a holding that the tax violates the Equal Protection and Commerce Clause of the United States Constitution.

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[3] See, generally, *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950), for a discussion of the effect of a denial of certiorari review.

SEE, JUSTICE (dissenting).

I respectfully dissent from the majority's no-opinion affirmance of the trial court's dismissal of this tax case. In my view, the taxpayers' claims are not barred by the doctrine of res judicata. Moreover, it is inescapable that the Alabama franchise tax scheme runs afoul of the design of the Constitution of the United States to make of this nation a single market.

Several foreign corporations, including South Central Bell, a number of related BellSouth companies, and CSX Transportation, Inc. (collectively, the "Taxpayers"), filed separate actions against the State Department of Revenue (the "Revenue Department"), alleging that Alabama's franchise tax scheme discriminates against foreign corporations in violation of the Commerce Clause of the Constitution of the United States. The Taxpayers' actions were filed while an action filed by Reynolds Metals Company raising the same constitutional challenge was on appeal to this Court. The Taxpayers' actions were stayed, however, pending the outcome of the Reynolds Metals appeal. This Court in *White v. Reynolds Metals Co. v. Sizemore*, 558 So. 2d 373 (Ala. 1989), cert. denied, 496 U.S. 912 (1990), held that Alabama's franchise tax scheme did not violate the Commerce Clause.

The Taxpayers then proceeded with their actions, seeking refunds of foreign franchise taxes paid for the tax years 1988, 1989, 1990, and 1991. After consolidating the actions for trial, the trial court dismissed the Taxpayers' claims, holding that *Reynolds Metals* finally decided the interstate commerce issue against the Taxpayers and, thus, that their claims were barred under the doctrine of res judicata. The Taxpayers filed this appeal.

I. Res Judicata

The doctrine of res judicata applies to bar a subsequent action only when there is (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction,

(3) with the same parties, and (4) with the same subject matter presented in both actions. *Smith v. Union Bank & Trust Co.*, 653 So. 2d 933 (Ala. 1995). In *Reynolds Metals*, 558 So. 2d 373, this Court, acting with proper jurisdiction, rendered a judgment on the merits, upholding the Alabama franchise tax scheme against a Commerce Clause challenge. However, we have stated that "the doctrine [of res judicata] should be sparingly applied in tax cases involving liability for different years." *State v. Plantation Pipe Line Co.*, 265 Ala. 69, 92, 89 So. 2d 549, 569, cert. denied, 352 U.S. 943 (1956). This is particularly true in this case, where we are dealing not only with different tax years, but also with different taxpayers. See generally *Richards v. Jefferson County*, 517 U.S. 793, ——-——, 116 S. Ct. 1761, 1768-69 (1996) (holding that the doctrine of res judicata could not bar the plaintiffs' federal constitutional challenge to a local tax where the plaintiffs had not been parties to a prior proceeding that resulted in a judgment on the tax). Further, the doctrine of res judicata does not apply when the judgment pleaded as an estoppel is based upon controlling decisions subsequently repudiated by supervening decisions, thereby necessitating a reexamination and an application of controlling precedent to the question. *Gillespie v. Commissioner of Internal Revenue*, 151 F.2d 903, 906 (10th Cir. 1945). Although the State pleads the judgment in *Reynolds Metals*, 558 So. 2d 373, as an estoppel in this case, the Supreme Court of the United States, as I explain below, has rendered intervening decisions that repudiate the *Reynolds Metals* rationale. Accordingly, the doctrine of res judicata does not bar this action.

II. Interstate Commerce

The Commerce Clause of the Constitution of the United States, art. I, § 8, provides:

> "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . . ."

The Supreme Court has long interpreted these words not only grant Congress a broad affirmative power to regulate interstate commerce, but also to preclude States from discriminating against interstate commerce. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) (1851); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The negative aspect of the Commerce Clause, often referred to as the Dormant Commerce Clause, prohibits a State from engaging in economic protectionism. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179-80 (1993). Thus, although States retain the police power to enact and enforce laws that will inevitably impose costs and benefits on businesses operating within their respective borders, the Dormant Commerce Clause precludes a State from so crafting its statutes as to discriminate against or unduly burden interstate commerce.

The Supreme Court has adopted a two-tiered approach in the application of its Dormant Commerce Clause jurisprudence. "When a State statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," the Supreme Court has "generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). "When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly," the Supreme Court has "examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Id.*

With respect to state taxes, a tax scheme is discriminatory if it "tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342 (1992) (quoting *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984)). A state taxation scheme that on its face discriminates against interstate

commerce is "virtually per se invalid." *Oregon Waste Systems, Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 99 (1994). Nonetheless, even a facially discriminatory tax may survive a Dormant Commerce Clause challenge if it is a "compensatory tax," that is, a tax "designed simply to make interstate commerce bear a burden already borne by intrastate commerce." *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 647 (1994).

In *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), the Supreme Court examined a North Carolina tax that the State claimed was purportedly compensatory. The State of North Carolina imposed an intangibles tax on the fair market value of stock owned by North Carolina residents. *Id.* at 327-28. The State, however, reduced the base of the intangibles tax by an amount that varied with the proportion of the corporation's income subject to North Carolina income tax. *Id.* Under this variable reduction scheme, residents who owned stock in a corporation that earned all of its income in North Carolina paid no intangibles tax, while residents who owned stock in a corporation that earned all of its income outside North Carolina paid the intangibles tax on the full fair market value of the shares owned. *Id.* Because the tax was computed on a different net base depending on the extent of the corporation's out-of-state activities, it facially discriminated against interstate commerce. *Id.* at 328, 333 & n.3 (quoting *Maryland v. Louisiana*, 451 U.S. 725, 760 (1981) ("We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.")).

The Supreme Court then addressed whether the North Carolina intangibles tax was nonetheless valid as a "compensatory tax." The Supreme Court set forth three conditions for upholding a discriminatory tax as a "compensatory tax":

> "First, 'a State must, as a threshold matter, "identif[y] . . . the [intrastate tax] burden for which the State is attempting to compensate."' . . . Second, 'the tax on interstate commerce must be shown roughly to approximate—but not exceed—the amount of the tax on intrastate commerce.' . . . 'Finally, the events on which the interstate and intrastate taxes are imposed must be "substantially equivalent"; that is, they must be sufficiently similar in substance to serve as mutually exclusive "prox[ies]" for each other.'"

Fulton, 516 U.S. at 332-33 (citations omitted). The Supreme Court rejected North Carolina's argument that its general corporate income tax imposed an intrastate burden for which the specific intangibles tax was meant to compensate.[4] *Id.* at 334-36. "[P]ermitting discriminatory taxes on interstate commerce to compensate for charges purportedly included in general forms of intrastate taxation would allow a state to tax interstate commerce more heavily than in-state commerce anytime the entities involved in interstate commerce happened to use facilities supported by general state tax funds." *Id.* at 335 (quoting *Oregon Waste*, 511 U.S. at 105 n.8 (quoting *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1284 (7th Cir. 1992), cert. denied, 506 U.S. 1053 (1993))).

Next, the Supreme Court held that North Carolina had failed to demonstrate that its intangibles tax on interstate commerce roughly approximated, but did not exceed, that portion of its general corporate income tax on intrastate

[4] The Supreme Court noted that the identified intrastate tax must serve a legitimate purpose for which the State could impose a burden on interstate commerce. *Fulton*, 516 U.S. at 334-36. The Supreme Court rejected North Carolina's argument that its general corporate income tax supported a capital market that the corporations had availed themselves of by selling stock to North Carolina residents. *Id.* The Supreme Court held that the relationship between North Carolina's general corporate income tax and its capital markets was too tenuous to allow a general tax on intrastate activities to serve as a complement to a specific discriminatory tax on interstate commerce. *Id.* at 336.

commerce that benefited foreign corporations (by creating a capital market that facilitated the sale of stock to North Carolina residents). *Id.* at 337-38. The Supreme Court stated "[w]here general forms of taxation are involved, we ordinarily cannot even begin to make the sorts of quantitative assessments that the compensatory tax doctrine requires." *Id.* at 338.

Finally, the Supreme Court held that North Carolina had failed to show that the events taxed by the intangibles tax, which taxed the value of stock, and by the general corporate income tax, which taxed income, were "substantially equivalent." *Id.* at 338-44 "Although we found such equivalence in the sales/use tax combination at issue in [*Heneford v. Silas Mason Co.*, 300 U.S. 577 (1937)], our more recent cases have shown extreme reluctance to recognize new compensatory categories." *Id.* at 338. The Supreme Court then concluded: "While we doubt that such a showing can ever be made outside the limited confines of sales and use taxes, it is enough to say here that no such showing has been made." *Id.* at 344.

Like the North Carolina intangibles tax, the Alabama franchise tax facially discriminates against interstate commerce. The State imposes the domestic corporation franchise tax on a base generally equal to the par value of the corporation's stock. See Ala. Code 1975, § 40-14-40 (imposing a 1% tax on the capital stock of domestic corporations). It imposes the foreign corporation franchise tax on a base generally equal to the portion of a corporation's total capital (that is, the par value of its stock, plus surplus, plus long-term debt, etc.) employed in the state, computed in accordance with generally accepted accounting principles. See Ala. Code 1975, § 40-14-41 (imposing a 0.3% tax on the capital employed in Alabama by foreign corporations). It is not facially apparent that application of the foreign franchise tax rate (0.3%) to the much larger base of par value plus other items such as surplus and long-term debt merely equalizes the burden produced

by the application of the domestic franchise tax rate (1%) to the easily manipulable base of par value. Simply by changing its state of incorporation from Alabama to any other state, a corporation operating in Alabama subjects numerous additional items on its balance sheet (e.g., surplus, long-term debt) to Alabama franchise taxation. The franchise tax facially discriminates against interstate commerce, and arguments over the degree of the discrimination do not affect this characterization. See, e.g., *Associated Indus.*, 511 U.S. at 650 ("[A]ctual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question of whether discrimination has occurred.") (citing *Louisiana v. Maryland*, 451 U.S. at 760 (1981)). Accordingly, Alabama's discriminatory foreign franchise tax can withstand a challenge under the Dormant Commerce Clause challenge only if that tax may be properly characterized as a "compensatory tax."

The State asserts that the higher rate of the domestic franchise tax and the additional tax imposed only on the shares of domestic corporations combine to impose an intrastate burden for which the higher foreign franchise tax compensates. See Ala. Code 1975, § 40-14-70 (imposing a shares tax by subjecting to property taxes 20% of a base roughly equal to the book value of the domestic corporation). Although this Court accepted a similar argument in *Reynolds Metals*, 558 So. 2d at 382-90, the Supreme Court has since clarified and narrowed the definition of a compensatory tax. *Fulton*, 516 U.S. at 332-33; *Oregon Waste*, 511 U.S. at 102. Assuming, arguendo, that the State has satisfied the first prong of *Fulton*, 516 U.S. at 332, by identifying intrastate taxes for which the discriminatory interstate tax is meant to compensate, the discriminatory interstate tax does not meet the second and third prongs of the Supreme Court's narrow definition.

The State has failed to demonstrate that its tax on interstate commerce—that is, the portion of the foreign

franchise tax produced by the higher tax base—roughly approximates, but does not exceed, the portion of the intrastate domestic franchise tax produced by the higher rate and the intrastate corporate shares tax. See *Fulton*, 516 U.S. at 332-33. In the face of the State's indefinite assertion that the general burden of the domestic franchise tax and the shares tax roughly approximates the burden imposed by the foreign franchise tax, the Taxpayers offer substantial evidence supporting the proposition that the foreign franchise tax exceeds any intrastate burden. The State, and not this Court, bears the exacting burden of showing that the interstate tax roughly approximates, but does not exceed, the identified intrastate taxes. See *Oregon Waste*, 511 U.S. at 105 (stating that the Supreme Court will not "plunge . . . into the morass of weighing comparative tax burdens"). The State has not borne its burden, and therefore has not met the second prong of *Fulton*.

The State also fails to show that the events taxed by Alabama's intrastate taxes and the interstate tax are "substantially equivalent." See *Fulton*, 516 U.S. at 333, 336-38. Unlike the mirror-image sales and use taxes approved in *Silas Mason*, 300 U.S. 577, which were, generally speaking, imposed on in-state and out-of-state sales, the foreign franchise tax is imposed on the event of doing business in the State, while the shares tax is imposed on the ownership of shares of stock. These two significantly different taxes cannot be viewed as "mutually exclusive proxies" for each other. See *Fulton*, 516 U.S. at 333, 338-40. The State has not met the third prong of *Fulton*.

The Alabama foreign franchise tax cannot be sustained as a compensatory tax. Accordingly, I would reverse the judgment of the trial court and remand for a determination of the proper remedy.

I dissent.

Kennedy and Butts, JJ., concur.

APPENDIX B

FIFTEENTH JUDICIAL CIRCUIT
CIRCUIT COURT

Consolidated Case No. CV-89-2600-G

Case Nos. CV-89-2600, CV-90-1591, CV-90-1711, CV-91-397, CV-91-1079

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Plaintiffs,

v.

STATE OF ALABAMA, STATE DEPARTMENT OF REVENUE,
Defendant.

Case Nos. CV-90-2555, CV-90-2556, CV-90-2557, CV-90-2558, CV-91-2151

CSX TRANSPORTATION, INC.,
Plaintiff,

v.

STATE OF ALABAMA, STATE DEPARTMENT OF REVENUE,
Defendant.

MEMORANDUM OPINION AND ORDER

In these consolidated actions, several foreign corporations (Taxpayers) subject to Alabama's foreign corporation franchise tax (*Ala. Code* § 40-14-41 (1975)), challenge the validity of Alabama's franchise tax scheme on

federal [1] and state [2] constitutional grounds. Each Taxpayer seeks a refund of franchise tax it paid, plus interest.[3]

The collective challenges by the Taxpayers are before the Court by means of various procedural vehicles, e.g., petition for declaratory judgment and refund (§§ 6-6-221 to 232 and § 40-1-11); appeals from final assessments pursuant to the Alabama Administrative Procedures Act; and petitions for mandamus or appeals from denial of petitions for refund of foreign franchise taxes (§ 40-1-34). In addition, the Taxpayers bring their action pursuant to 42 U.S.C.S. §§ 1983 and 1988, and they seek to recover their attorneys' fees and all costs of these actions.

This is the second occasion this Court has had to consider the validity of the Alabama franchise tax on foreign corporations. *Reynolds Metals Co.; et al., v. James C. White, Jr., et cetera; et al.*, Civil Action No. CV-86-1093-G (Montgomery County, Alabama, Circuit Court)

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[1] The taxpayers contend that Alabama's franchise tax scheme facially or as applied, or both, violates the equal protection clause and the commerce clause of the United States Constitution. U.S. Const., amendment XIV; U.S. Const., art. I, § 8, clause 3.

[2] The taxpayers contend that Alabama's franchise tax scheme violates the due process and equal protection clauses of the Alabama Constitution. The taxpayers also contend that the legislature impermissibly delegated its authority to the Department of Revenue to define the tax base for taxing domestic corporations in violation of Ala. Const., art. XI, § 212; and art. IV, § 44. Finally, they contend that § 40-14-41 levies the foreign franchise tax on a tax base which includes components of capital which are not authorized by Ala. Const., art. XII, § 232.

[3] South Central Bell paid franchise taxes under protest for the years 1986 through 1991, and it seeks a refund of $30,748,066.31, plus interest. Bell South Corporation and several of its subsidiaries seek refunds of tax paid for the tax years 1990 and 1991 in the amount of $810,880.00, plus interest. CSX Transportation, Inc., and some of its predecessors, seek refunds of taxes paid for tax years 1982 through 1991 in the amount of $5,690,235.76, plus interest.

(hereinafter *Reynolds*). This Court ruled based on federal equal protection grounds, that the franchise tax scheme impermissibly discriminated against foreign corporations but applied the ruling prospectively. The ruling was affirmed by the Alabama Court of Civil Appeals. *White v. Reynolds Metals Co.*, 558 So. 2d 367 (Ala. Civ. App. 1989); however, the ruling by this Court and the decision of the Alabama Court of Civil Appeals was reversed by the Supreme Court of Alabama, *White v. Reynolds Metals Co.*, 558 So. 2d 373 (Ala. 1989), *cert. denied, Reynolds Metals Co. v. Sizemore*, 496 U.S. 912 (1990).

In view of the history of the franchise tax litigation, the State of Alabama strongly asserts that this action is barred by *res judicata* (issue preclusion and claim preclusion), and that all claims raised by the Taxpayers were decided adversely to them in *White*, 558 So. 2d 373. The Taxpayers contend that even if this action is barred by *res judicata* as determined by Alabama law, applying the doctrine in this case would deprive him of due process of law guaranteed by the Fourteenth Amendment. *Richards v. Jefferson County, Alabama*, 517 U.S. ——, 135 L.Ed. 2d 76 (1996).

The Court holds that based upon Alabama jurisprudence, the Taxpayer's claims are barred by *res judicata*.[4]

Having determined that the Taxpayers' claims are barred by *res judicata*, as that doctrine is defined by the decisions of the Alabama Supreme Court, the Court must next determine whether the bar is an extreme application of the doctrine which denies the Taxpayers their day in court in violation of their federal due process rights guaranteed by the Fourteenth Amendment. *Richards*.

Richards was decided on a ground not presented to the trial court and which was only presented to the Alabama

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[4] This Court initially denied the Department of Revenue's motion for summary judgment based on the doctrine of *res judicata* and which raised issues of *stare decisis*.

Supreme Court on application for rehearing. *Richards*, 135 L.Ed.2d 83, fn. 3. The United States Supreme Court focused on the Alabama Court's holding that the plaintiffs in *Bedingfield* adequately represented the plaintiffs' class interests in *Richards*. *Id.* at 84. As understood by this Court, the United States Supreme Court held that under the facts of *Richards*, the finding by the Alabama Supreme Court that the petitioners were adequately represented by the *Bedingfield* plaintiffs was erroneous because the petitioners (a class of plaintiffs) did not receive notice of the *Bedingfield* litigation and they were not sufficiently represented in the *Bedingfield* litigation. *Id.* at 88. However, the Court does not understand *Richards* to hold that there is no tax case when *res judicata* cannot bar a subsequent action attacking the levy on Federal Constitutional grounds.

The defendants in this action are not attempting to bind a "class" of persons to a prior judgment to which they were not a party. The Taxpayers are large and sophisticated corporations, and it is logical to conclude that they are well informed in all matters involving issues of national and state taxation, and that they stay well informed of significant pending legal actions and court decisions. This is not to suggest that a corporation is entitled to any less notice and the opportunity to be heard than a private citizen; indeed, they have the same rights under our State and Federal Constitutions. However, it is logical to resolve an evidentiary issue of notice against the sophisticated and more informed non-party.

South Central Bell Telephone Company is the lead party in these consolidated actions. It filed its administrative appeal in this court on December 15, 1989, which was after the Alabama Court of Civil Appeals had affirmed this Court's ruling that the franchise tax on foreign corporations violated the Federal Constitution, and 14 days before the Alabama Supreme Court reversed. The

Taxpayers admit that they were aware of the *Reynolds* action at the time of this Court's decision in that case. The decision of the Court of Civil Appeals was known to South Central Bell at the time of the administrative proceedings before the Department of Revenue. *See* South Central Bell's complaint and petition for judicial review, p. 3. Therefore, as admitted, South Central Bell and the other Taxpayers had actual notice of the *Reynolds* litigation.

This Court issued its ruling finding that the foreign franchise tax was unconstitutional on ————————, and on ————————, the Court issued a separate ruling applying the ruling prospectively only and denying the *Reynolds* taxpayers' claims for refunds of foreign franchise taxes. The *Reynolds* taxpayers were represented by well known and excellent counsel who were experienced in constitutional litigation of this nature. Although all of the precise arguments may not have been made in *Reynolds* that are presented to this Court, the *Reynolds* action and this action arise out of the same nucleus of operative facts, and the *Reynolds* taxpayers as well as the Taxpayers in this action contend that the foreign franchise tax violates the equal protection and commerce clauses of the Federal Constitution. Both of these claims were addressed and decided in *Reynolds* by the highest court of this state. There was not a significant lapse of time between the *Reynolds* litigation and these consolidated actions as there was in *Bedingfield* and *Richards*. There is no conflict between the interests of the *Reynolds* taxpayers and the Taxpayers in this action. *See Hansberry v. Lee*, 311 U.S. 32 (1940). Finally, the Court notes that the Taxpayers are represented by the same attorney.

Based upon the foregoing reasons, the Court concludes that applying the bar of *res judicata* to these consolidated actions does not violate the Taxpayers' due process rights.

Notwithstanding the holding that these consolidated actions are barred by *res judicata,* the Court has considered at length the issues presented and the evidence, and it will address in summary fashion the merits of this action because of the public importance of the issues presented.

The Taxpayers ask the Court to revisit the Alabama franchise tax scheme on foreign corporations for several reasons: (1) the enhanced quality of their evidence [5]; (2) because their attack on the tax scheme is based on different theories; and (3) because commerce clause jurisprudence has evolved significantly since the decision in *Reynolds* in 1989.[6]

The Court holds that the Taxpayers have an adequate remedy under Alabama law; therefore, the Tax Injunction Act (28 U.S.C.S. § 1341) would have precluded them from seeking an injunction in Federal Court. Because of this, their claims based on 42 U.S.C.S. §§ 1983 and 1988 are due to be dismissed. *National Private Truck Council, Inc. v. Oklahoma Tax Commission,* 515 U.S. ——, 132 L.Ed.2d 509 (1995).

The Court holds that the legislature has not delegated its power to tax to the Alabama Department of Revenue; therefore, there is no violation of sections 44 or 212 of the Alabama Constitution.

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[5] Of course, the Taxpayers had the advantage of being able to tailor their evidence to address the evidentiary analysis applied by the Alabama Supreme Court in *Reynolds.*

[6] The Taxpayers may also be impliedly asserting that the *Reynolds* Court did not properly apply commerce clause jurisprudence because the court seemed to assume that equal protection analysis was equally applicable to determine the issues presented under the commerce clause. *See Reynolds,* at 382 (the court said that "the ultimate question in applying equal protection or commerce clause analysis to the facts is virtually the same.")

The Court is not convinced, based on the Taxpayer's evidentiary foundation, that the foreign corporation franchise tax statute violates § 232 of the Alabama Constitution because it includes components as capital which were not historical components of capital in 1901.

The Court holds that the Taxpayers' claims and arguments bottomed on the equal protection clauses of the Federal and State Constitutions were exhaustively addressed by the Alabama Supreme Court in *Reynolds* and decided adversely to their positions as urged in this action. Therefore, this Court is bound by the decision in *Reynolds* on these claims, and they are due to be dismissed. The Court does not, however, reach the same conclusion with respect to the Taxpayers' claims based on the commerce clause of the Federal Constitution.

In *Reynolds,* the Alabama Supreme Court addressed many of the commerce clause cases cited by the Taxpayers in this action; however, the Court believes that since 1989, the United States Supreme Court has made it abundantly clear that a state's tax scheme cannot impose the slightest burden on interstate commerce unless there is some reason for doing so other than economic protectionism. *Oregon Waste Systems v. Department of Environmental Quality,* 511 U.S. ——, 114 S. Ct. 1395 (1994); *Associated Industries v. Lohman,* 511 U.S. ——, —— S. Ct. —— (1994). In addition, the decision in *Fulton Corporation v. Faulkner,* —— U.S. ——, 133 L.Ed.2d 796 (1996), enlightens the analysis of the complementary tax doctrine and appears to supercede the reasoning of the *Reynolds* court. The Court finds that the Taxpayers' evidence [7] in this action clearly and abundantly demonstrates that the franchise tax on foreign corporations discriminates against them for no other reason than the state of their incorpora-

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[7] See Taxpayers' brief filed May 17, 1994, pp. 10-39, which the Court finds to fairly state the evidence in this case and, except as otherwise indicated, the Court adopts as its own.

tion. Accordingly, the Court finds that the franchise tax on foreign corporations violates the commerce clause of the Federal Constitution.

Consistent with the Court's opinion in the *Reynolds* litigation, the Court would hold that the relief to be afforded the Taxpayers in this case is prospective only, and the Court merely notes that there are forms of relief to cure a constitutional violation in tax cases of this nature other than ordering a refund.

Because the Court has held that this action is barred by *res judicata* and the application of that doctrine does not violate the Taxpayers' equal protection rights under the Fourteenth Amendment of the United States Constitution, it is ORDERED that the Taxpayers' claims are dismissed, and the costs of this action are taxed against the Taxpayers.

DONE and ORDERED this 3rd day of December, 1996.

/s/ William Gordon
WILLIAM GORDON
Circuit Judge

cc: Ron Bowden, Esq.
Walter R. Byars, Esq.

APPENDIX C

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

Case No. CV-89-2600 (with consolidation of CV-90-1591, CV-90-1711, CV-91-397 and CV-91-1079)

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Plaintiffs

v.

STATE OF ALABAMA, STATE DEPARTMENT OF REVENUE,
Defendant

Case No. CV-90-2555 (with consolidation of CV-90-2556, CV-90-2557, CV-90-2558 and CV-91-2151)

CSX TRANSPORTATION, INC.,
Plaintiff

v.

STATE OF ALABAMA, STATE DEPARTMENT OF REVENUE,
Defendant

Consolidated As CV-89-2600-G

BRIEF OF PLAINTIFFS/TAXPAYERS

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Attorney for Plaintiffs

[Extracted from pages 10-39 of Brief of Plaintiffs/Taxpayers filed in Circuit Court on May 17, 1994; incorporated by the Circuit Court in its opinion (slip op. 9 n.7) dated December 3, 1996, *see* Pet. App. 21a n.7.]

STATEMENT OF THE FACTS

For the purposes of Alabama franchise tax, a domestic corporation is any corporation organized under the laws of Alabama [11] while a foreign corporation is any corporation organized under the laws of any state other than Alabama.[12] Each of the Taxpayers was a foreign corporation engaged in interstate commerce and doing business within Alabama and in each of the applicable tax years was taxed as a foreign corporation and required to file and pay, and filed and paid, Alabama franchise tax as a foreign corporation pursuant to § 40-1-41. (Stipulated Facts, Pars. 1-5; Affidavits, Shepherd, p. 2 and Hanford, p. 2, Par. 2) Taxpayers as foreign corporations (and other foreign corporations) were required to pay Alabama franchise taxes on the tax base set forth in § 40-14-41 and as required by the Department solely by virtue of the fact that each of those corporations is organized in a state other than the State of Alabama. (Admission, 24; Stip., Par. 2)

Under the Alabama franchise tax scheme, a different franchise tax based on a different tax base is levied on foreign corporations pursuant to § 40-14-41 than is levied on domestic corporations pursuant to § 40-14-40.[13] A difference in the tax base is required by the Alabama Constitution of 1901: Art. XII, § 232, mandates the levy of a franchise tax on foreign corporations "based on the actual amount of capital employed in this state," but does not define "capital employed in this state." Art. XII, § 229, mandates the levy of a franchise tax on domestic corporations in "proportion to the amount of capital stock," but does not define "capital stock" or the "amount of the capital stock." (Stip., Pars. 5-10, inclusive) "Capital stock" on which tax base domestic corporations are required to pay Alabama franchise tax is not defined in either § 229 or § 40-14-40 (Stip., Par. 16); and there are no legislative or statutory guidelines for defining or applying the domestic franchise tax base of "capital stock." (Broadhead Dep., pp. 18-19, 32-3; [14] White Aff., Par. 3) "Capital employed," though not defined in § 232, consists of components clearly defined in § 40-14-41.

Taxpayers as foreign corporations (and all foreign corporations) doing business in Alabama were required to pay Alabama franchise tax pursuant to § 40-14-41 in an amount which is determined by applying the tax rate of $3.00 per $1,000 to the amount of capital employed in the State of Alabama by that corporation. Pursuant to § 40-14-41, the amount of capital employed which is the tax base against which this tax rate is multiplied is the total actual value of the following items of capital em-

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11 "Every corporation organized under the laws of this state. . ." § 40-14-40.

12 "Organized under the laws of any other state, nation or territory. . . ." § 40-14-41(a).

13 There is a separate statute levying each tax; under those separate statutes, there is a different base for domestic corporations than for foreign corporations; and there is a different tax rate since 1984. Prior to 1984, the tax rate was the same for both domestic and foreign corporations, $3.00 per $1,000 to be applied against the different tax bases. Since 1984, the foreign corporations have continued to be taxed at $3.00 per $1,000 on their tax base, and domestics have been taxed at $10 per $1,000 on a par value tax base. (Broadhead Dep., pp. 18-19)

14 Ernest J. Broadhead, deposed by Taxpayers, is and has been Chief of the Franchise Tax Division, Alabama Department of Revenue, since July 1982, and is the person with state government most familiar with the purposes behind and application of the franchise tax and domestic shares tax laws in Alabama. (Broadhead Dep., pp. 6-7)

ployed by that corporation in Alabama (subject to exclusions and deductions and the maximum tax base for public utilities): [15]

(1) Outstanding capital stock;

(2) Surplus and undivided profits;

(3) Long-term debts;

(4) Certain related party debts; and

(5) Accelerated depreciation.

In addition to these five items included within the statutory definition of "capital employed in this state," [16] since 1982 Department has required on the foreign franchise tax return that deferred income taxes be included as a separate additional item in the tax base. (Stip., Par. 5; Admission, 4A; Broadhead Dep., p. 63; White Aff., Pars. 3 & 9) The franchise tax imposed on Taxpayers (and other foreign corporations) pursuant to § 40-14-41 was (and is) based on the actual value of the capital employed in the State of Alabama, including the actual value of each of the statutory components set forth in § 40-14-41, and of deferred income taxes as a component

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[15] The foreign tax base is subject to the exclusions and deductions as set forth in § 40-14-41(d) and to the maximum tax base for public utilities and transportation companies, which include all CSXT Taxpayers and Taxpayer South Central Bell (now BellSouth Telecommunications, Inc.) in the value of the sum of its tangible property located in Alabama and its intangible property employed in the conduct of its business in Alabama as set forth in § 40-14-41(c). (Stip., Par. 5; Admission, 4A)

[16] Since September 8, 1961, upon passage of Act No. 912, § 40-14-41 and its predecessors have included these five statutory components, which have constantly remained a part of the foreign franchise tax base. Surplus and undivided profits, long-term debts, related party debt and accelerated depreciation were first included as components of "capital employed" upon passage of Act No. 912. (Stip., p. 51-55)

required by the Department.[17] (Admission 4B; Stip., Par. 18; White Aff., Pars. 3 & 9)

The Alabama franchise tax imposed upon domestic corporations pursuant to § 40-14-40 is computed by applying the tax rate of $10 per $1,000 (except during 1982 and 1983, the tax rate was $3 per $1,000) to the amount of the par value of the capital stock of the domestic corporation with "par value" capital stock and to the amount of stated value of the capital stock of the domestic corporation with "no-par" capital stock. (Stip., Par. 9)

The tax base upon which Alabama franchise tax is imposed pursuant to § 40-14-40 on domestic corporations is defined in the statute only as "its capital stock," but as applied by the Department is imposed solely on the "par value" (or if "no-par" capital stock, on the "stated value") of the capital stock of the domestic corporation as the sole franchise tax base for domestic corporations.[18] (Stip., Pars. 15-17 & 29; White Aff., Pars. 3-4 & 9)

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[17] Deferred taxes does not appear in the statute nor in the Alabama Constitution, nor in writing as a regulation of the Department. The Department has, by interpretation and without statute or Constitution, included deferred taxes on the foreign tax return as requiring foreign franchise taxes to be paid on this additional factor in determination of capital employed. (Broadhead Dep., pp. 59-63) Deferred taxes has appeared as a factor for determining the "capital employed" tax base on the foreign franchise tax return since 1982. (Broadhead Dep., p. 63)

[18] "Par value" has never been the standard adopted by the Legislature. Prior to the early 1900s, there was no domestic franchise tax. When the Legislature enacted a domestic franchise statute [Act 216, § 12, General Acts of Alabama 1911], the statute defined the tax base as "paid-up capital stock." This standard remained until the statute was changed to levy the tax "based on its capital stock," which tax base has remained in effect until the present time. General Acts of Alabama, Act No. 172, § 10, & Act No. 263, § 10 (1923) The Department, at least since 1935, has applied "par value" as the tax base. "Paid-up" capital stock is not the equivalent of par value of capital stock. "Paid-up" capital stock includes

"Par value" does not appear in § 40-14-40 levying Alabama franchise tax on domestic corporations; that statute states "its capital stock," but does not define "capital stock." (Stip. Pars. 56-58) Neither the Alabama Constitution nor § 40-14-40 establishes "par value" as the tax base for domestic corporations. The Department has defined "capital stock" insofar as its levy on domestic corporations is concerned as "par value of capital stock," which appears as the tax base on the domestic franchise tax form or return. (Broadhead Dep., pp. 32-3, 36-37) Par value is not the real value of the capital stock, it is an arbitrary fictional value rather than its real or actual value. (Admission 18; Broadhead Dep., pp. 31-32; White Aff., p. 4)

Neither the par value nor the stated value of shares of capital stock of a domestic corporation represents the book value or market value or actual or real value of the capital stock of the domestic corporation as a going concern. (Stip., Pars. 19 & 20; Broadhead Dep., p. 34; White Aff., Par. 4, p. 5)

There is no reason under the statute—§ 40-14-40—or the Constitution that would prohibit the Department through interpretation or regulation, from adopting actual value, book value or market value (rather than its adoption of par value) for the definition of capital stock and levy the tax on any one of those bases. (Broadhead Dep., p. 40; Stip., Pars. 56-58)

Alabama franchise tax on domestic corporations, as applied by the Department, uses (and has used) a tax base of "par value" (or stated value) of the capital stock. (Broadhead Dep., p. 34) "Par value" of the corporate stock of domestic corporations with par value stock was

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all of the consideration paid by the subscriber to the capital stock, including capital surplus. "Par value" by definition excludes capital surplus. (White Aff., Par. 4; Broadhead Dep., pp. 36-38)

used by the Department during the tax years 1982 through 1991 as the tax base upon which domestic franchise taxes are applied or calculated. The tax base used for Alabama domestic franchise tax does not include, and the domestic franchise tax imposed pursuant to § 40-14-40 is not computed by applying the applicable tax rate multiplied by, the book value or market value or actual value of the domestic corporation's capital stock. (Stip., Pars. 11 & 12; Broadhead Dep. p. 34)

Department and Commissioner have levied Alabama franchise taxes on domestic corporations pursuant to § 40-14-40 based solely on a tax base of the "par value" (or where no-par, the "stated value") of the shares of capital stock of domestic corporations while levying Alabama franchise tax on Taxpayers (and other foreign corporations) engaging in business within Alabama pursuant to § 40-14-41 based on the actual value of capital employed in Alabama by each foreign corporation, which "capital employed" tax base included the actual value of the outstanding stock, surplus and undivided profits, long-term debt, certain related party debts and accelerated depreciation as provided by statute, and of deferred income taxes required by the Department to be included as a separate item in the tax base.[19] (Stip., Pars. 28 & 29; White Aff., Par. 9)

The tax base upon which Alabama franchise tax is imposed upon domestic corporations pursuant to § 40-14-40 does not include surplus and undivided profits and long-term debts, the amount of certain related party debt, or the accelerated depreciation of the domestic corporation, all statutory components of the foreign franchise tax base, or deferred taxes which was a Department required component of the foreign franchise base. None of these com-

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[19] Subject to the exclusions and deductions set forth in § 40-14-41(d) and to the maximum tax base for public utilities and transportation companies as set forth in § 40-14-41(e).

ponents or factors is used by the Department in determining the amount of "its capital stock" or the amount of franchise tax to be paid by a domestic corporation. (Stip., Par. 13) The tax base for foreign corporations for the purpose of determining the amount of Alabama franchise tax to be paid pursuant to § 40-14-41 includes the value of items of capital—surplus and undivided profits, long-term debt, certain related party debt, accelerated depreciation and deferred taxes—not included in the franchise tax base of domestic corporations for the purpose of determining the amount of Alabama franchise tax to be paid pursuant to § 40-14-40. (Stip., Pars. 13 & 14; White Aff., Pars. 3-4 & 9)

A domestic corporation organized under the laws of Alabama may control the amount of its domestic franchise tax by assigning as the "par value" or "stated value" of its capital stock any value selected by it, and may by its own action incorporate with a minimal amount assigned as "par value" or "stated value," and may thereafter increase or decrease the "par value" of its capital stock, without any basis, measure or yard stick for determining "par value" or the amount of "par value." (Stip., Pars. 21 & 22; Admission 20) A domestic corporation can arbitrarily and unilaterally reduce the amount of franchise tax paid by it to the minimum tax by establishing a low par value upon incorporation or by later reducing at any time the par value (or stated value) of its capital stock. (Stip., Par. 24; White Affidavit, Pars. 4-5)[20]

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[20] White, in the practice of his profession, has advised many corporations, both prior to and after incorporation, to utilize and they have utilized a minimal arbitrary "par value" to minimize the domestic franchise tax liability, and to change the par value of their capital stock. Foreign corporations have been advised and have incorporated under Alabama law wholly-owned domestic subsidiaries with a minimal par value to minimize (even to the minimum tax) franchise tax liability, while the actual amount of the parent foreign corporation investment in the capital of the subsidiary is excluded from the foreign franchise tax liability. The Alabama franchise tax scheme provides tax incentives to induce

A foreign corporation doing business in Alabama cannot reduce the amount of its Alabama franchise taxes paid by it, or reduce the actual amount of its capital employed in Alabama, by reducing the par value or the stated value of its capital stock. (Stip., Pars. 25 & 26) "Par value" or changes in "par value" for foreign corporations have no effect on the foreign franchise base or the foreign franchise tax liability (White Aff., Par. 5)

The franchise tax base for foreign corporations (but not for domestic corporations) increases, and foreign corporations (but not domestic corporations) incur increased franchise tax liabilities, with corresponding increases in the retained profits or accumulated surplus, increases in long-term and related party debt or as the depreciation reserve is increased by the utilization of accelerated depreciation and is increased as deferred taxes of the foreign corporation increase. (Stip., Pars. 61-64; White Affidavit, Par. 5; Interrogatory, 6 A, B & C)

In addition to the foreign and domestic franchise taxes, there are permit fees levied and paid by both franchise and domestic corporations which are essentially identical in amounts. Additionally, there is a separate ad valorem tax levied on shares of capital stock of domestic corporations under § 40-14-70 ("domestic shares tax") and an equivalent ad valorem tax levied on the shares of capital stock of foreign corporations under § 40-11-1(9) (which exempts shares of capital stock of domestic corporations). Both ad valorem taxes are levied on the shareholder and not the corporation; however, the domestic shares tax levied under § 40-14-70 is normally paid by the corporation as a volunteer, but not imposed on the corporation by statute (only by virtue of the corporation having con-

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incorporation under the laws of Alabama, which result in discrimination in favor of domestic corporations incorporating under Alabama law to the detriment of and imposing a higher tax burden on foreign corporations solely on the basis of the state of incorporation. (White Aff., Par. 6)

sented in writing on the tax form to pay the shares tax).[21] (Broadhead Dep., pp. 19-22, 67; White Aff., Pars. 7-8) "Capital stock" in the franchise tax base is part of the financial structure of the corporate entity and is the property of the corporation, which appears on the books of the company; absent corporate dissolution, the shareholder has no right to the capital stock account of the corporation. The shares of capital stock included as the property subject to ad valorem tax on domestic and foreign corporate shares are the property of each shareholder evidencing his investment in the corporation, which the corporation has no right to take away from the shareholder. (Broadhead Dep., pp. 67-8; White Aff. Pars. 7-8)

The Alabama domestic franchise tax is an excise tax imposed upon the corporate existence of a domestic corporation based on the amount of "capital stock" (Admission, 5(b)); foreign franchise tax is likewise an excise tax, but is imposed on the privilege of doing busiess as a corporation in Alabama (Stip., Par. 16) and based on the amount of "capital employed" in Alabama. Neither is based on the value of property nor is an ad valorem tax. (Broadhead Dep., pp. 40-1, 122; White Aff., Par. 7)

The domestic shares tax levied pursuant to § 40-14-70 is an ad valorem tax levied on the shares of stock owned by the shareholder and is an ad valorem tax on ownership; the tax on the shares of stock of foreign corporations imposed by § 40-11-1(9) is also levied as an ad valorem tax on the ownership of shares of stock by the shareholder of the corporation. (Broadhead Dep., pp. 145-47; White Aff., Pars. 7-8) The taxable event of the domestic shares tax is the ownership of the shares of stock based on their

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[21] Section 40-14-73 permits the domestic corporation as a volunteer to pay the shares tax imposed upon its shareholders and the domestic shares tax return form—Taxpayers' Exhibit 14—reflects that an agreement that authorizes the collection of the corporate shares tax against the corporation. However, under the statute, the domestic shares tax levy is actually against the shareholder and not the corporation. (Broadhead Dep., p. 155; White, Par. 7)

value, while the taxable event in the case of franchise taxes is the incorporation in Alabama or the qualifying to do business in Alabama. The domestic shares tax is not comparable to the Alabama franchise taxes because taxes are levied on different persons (corporation vs. shareholder), on a different tax base (capital stock vs. shares of capital stock) and on a distinctly different taxable event (privilege tax on incorporation or doing business vs. ad valorem tax on the value of property). (White Aff., Par. 7)

The tax base is different between foreign franchise tax and domestic shares tax. The tax base for the foreign franchise tax includes in addition to the value of outstanding capital stock, other components of long-term debt, certain related party debt, and accelerated depreciation by statute and deferred taxes by order of the Department. The domestic shares tax includes only the value of the shares of capital stock, not the capital account in the corporation and not any debt, accelerated depreciation or deferred taxes account. (White Aff, Par. 9, pp. 10-11) The domestic shares tax excludes certain things from its tax base, the base being the residue after deducting government obligations, book value of tangible property in other states, air pollution equipment, book value of equipment, book value of inventory, book value of motor vehicles and cost of capital owned in domestic corporations, all of which is deducted from the total value of the capital stock of the domestic corporation, which is then reduced to the 20% assessment value of the residue, from which is deducted the assessed value of real and tangible personal property upon which ad valorem is paid in Alabama by the domestic corporation. While some of the deductions can be made from the foreign franchise tax base (e.g., air pollution equipment and cost of capital stock owned in domestic corporations), the other deductions are not available from the foreign franchise tax. Specifically, foreign corporations may not deduct the value of real and tangible personal property upon which ad valorem taxes

have been paid from their foreign franchise tax base. (Broadhead Dep., pp. 147-49) Further, the purchase of short-term U. S. Government obligations at the end of the fiscal year could effectively eliminate any remainder subject to domestic shares tax. (White Aff., Par. 9, p. 11)

The domestic shares tax should not be considered as a part of the domestic corporation's tax burden nor as complementary to the franchise tax. (White Aff., Par. 7, p. 9) The Alabama domestic shares tax is complementary to the ad valorem tax imposed upon the shareholder/owner of the shares of capital stock in foreign corporations levied pursuant to § 40-11-1(9); each is imposed upon the shareholder/owner of the shares of stock; each is an ad valorem tax based on a taxable incident of ownership on the same return date—October 1—and at the same taxable assessed value of 20%. The collection agency for the ad valorem taxes on domestic shares and on foreign shares is the county government (not the State). (White Aff., Par. 8; Broadhead Dep., pp. 121-22)

"A Study of the Differences in Franchise Tax Liability for Foreign vs. Domestic Corporations—Alabama." [22] by Dr. Larry E. Richards,[23] which was prepared from a scientific sample designed by and conducted under the supervision and direction of Richards, was commissioned and introduced by Taxpayers. The details of the underlying documentation and computations used in the Study are set forth in the Affidavits of Adele Howell Shepherd and James D. Hanford.

[22] This Study was attached to the Affidavit of Dr. Larry E. Richards, which Affidavit was supplemented. The Study was based on a valid statistical sample of domestic corporations, the source data was obtained from information furnished by the Department and the statistical procedures applied in the research (stratification, sampling, estimators, tests and interval estimates) have mathematically (provable) foundations and are in accordance with generally accepted valid statistical practice and procedures. (Study, pp. 22, 1, 4, 9-16) Although the Study has lengthy appendices showing underlying data, the Study and its conclusion are documented on the first 22 pages.

[23] Chairman of the Decision Sciences Department of the School of Business at the University of Oregon with vast experience as a statistician employed to conduct studies relating to taxation. Richards' Vita is attached to his affidavit.

The objective of the Study was to determine whether the Alabama franchise tax scheme was discriminatory between domestic and foreign corporations prior to 1992 with primary emphasis of the Study on the time period 1988-91. (Study, p. 1)[24] The Study noted that Alabama had different franchise tax bases and rates for domestic vs. foreign corporations which create differential treatment and the potential for discrimination based solely on the state of incorporation, which differences necessarily result in differential treatment which facially or as applied may result in discrimination between domestic and foreign corporations. (Study, p. 1)

The Study concludes that Alabama franchise tax statutes as applied have in fact resulted in discrimination in favor of domestic corporations to the detriment of foreign corporations, which discrimination was determined by comparing the domestic franchise tax paid by the sampled corporations under § 40-14-40 with the foreign franchise tax liability calculated under § 40-14-41 by treating the sampled domestic corporations as if they were foreign corporations.[25]

[24] The overall results and conclusions of the Study performed by Richards for the years 1988-1991 are substantially applicable to the years 1982-1987. (Stip., Par. 66)

[25] By applying the two different franchise tax bases and rates to each of the sample domestic corporations, the size and structure of each corporation remains constant, with one franchise tax calculation made pursuant to the domestic statute and the other made pursuant to the foreign statute. Since the same corporations are involved and it is the difference in the franchise tax that is measured, the size and structure are identical, removing the distinction made in *Reynolds Metals*, 558 So.2d at 384-86, 389. (Study, p. 3)

For the years 1988-1991, the "as if foreign" franchise tax was more than 5 times the amount of average domestic franchise tax actually paid by the same domestic corporations. The percentage of discrimination ranged from 409.56% in 1988 to 509.15% in 1991, with the population of 40,000 Alabama domestic corporations paying between $38,877,183 in 1988 increasing progressively to $46,333,601 in 1991 less in Alabama franchise tax than they would have paid had they been treated as foreign corporations. (Study, pp. 1-2; Chart, p. 2)

Using the same sample data, the Study also determines the effective tax rates for domestic corporations based on their capital employed in Alabama. By statute (§ 40-14-41), foreign corporations pay Alabama franchise tax at the rate of $3 per $1,000 of capital employed in Alabama. By determining the effective domestic franchise tax rates, the ratio of domestic franchise tax to capital employed in Alabama by those domestic corporations, the effective rate domestic franchise rates are less than $.60. This means that the domestic corporations paid an annual franchise tax of a rate of less than $.60 per $1,000 [26] of capital employed in Alabama; or that foreign corporations paid franchise tax to Alabama at 5 times the effective rate paid by domestic corporations ($3/$.60 equal 5). (Study, pp. 16-17, Table 5, p. 18)

Based on the Department's position that the Alabama domestic shares tax [27] is a complementary tax to the franchise tax, Richards' Study did a similar comparison

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[26] $.589 for 1988; $.571 for 1989; $.565 for 1990; and $.497 for 1991.

[27] By statute, the domestic shares tax is not a tax liability of the domestic corporation, but is imposed on the shareholders of the corporation (§ 40-14-70(a)(2)). Department contends (erroneously) that since the domestic shares tax is almost always paid by the domestic corporation as a volunteer, that tax should be considered as a complementary tax to the corporate franchise tax which is imposed on the corporation.

between the total of franchise tax and shares tax paid by domestic corporations to the "as if foreign" franchise tax for the same domestic corporation. The Study shows that even combining the domestic franchise tax burden with the domestic shares tax burden, the "as if foreign" franchise tax calculated for the domestic corporations would be 2 times the amount of the total domestic tax. Or stated differently, the discrimination against the "as if foreign" corporation is approximately 100%—ranging from 109% in 1988 to 104% in 1991. (Study, p. 17; Table 6, p. 21) Additionally, the effective total tax rate of the domestic corporations when the domestic shares tax is included in the calculation of the tax burden to the domestic corporation is an effective total tax rate of $1.50 vs. $3.00 per $1,000 for foreign corporations, or domestic corporations have an effective tax rate that is only one-half of the tax rate for foreign corporations ($1.50/$3). (Study, p. 17; Table 5, p. 18)

The domestic shares tax calculation originally was made using a statewide weighted composite average millage rate provided by the Department. Richards made additional calculations using the maximum millage rate per county for the applicable tax year for each of the sampled domestic corporations. Although the use of the maximum county millage rate resulted in an over statement of the domestic shares tax,[28] the results were not changed substantially—the domestic corporations have an effective total tax rate of $1.64 vs. $3.00 per $1,000 for foreign corporations, or domestic corporations have an effective total tax rate that is slightly over one-half the tax rate for foreign corporations ($1.64/$3). (Richards' Supplemental Affidavit)

Based on the statistical Study, including the mean difference for the population of domestic corporations in

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[28] County-by-county maximum millage rate "would be a higher millage rate." (Broadhead Dep., pp. 159, 160)

Alabama for each of the years 1988-1991, Richards' Study concludes that discrimination does exist in favor of domestic corporations; that the population of domestic corporations in Alabama for each of those years paid less franchise tax in Alabama than they would have paid as foreign corporations and would have paid more in franchise taxes if they had been subject to the same franchise tax treatment as a foreign corporation under § 40-14-41 (5 times the tax paid as a domestic); and even if the domestic shares tax is considered a burden on the domestic corporation, substantial discrimination is established—the domestic corporations paid less total tax in Alabama than they would have paid as foreign corporations (one-half) and would have paid more in franchise taxes (twice the rate and amount) if they had been subject to the same franchise tax calculation or treatment as a foreign corporation under § 40-14-41. (Study, p. 22, Table 5, p. 18; Table 6, p. 21)

Based on Richards' personal knowledge and the Study, at least for the years 1988-1991, foreign corporations in Alabama, including the Taxpayers BellSouth companies and CSXT, have been victims of discrimination in the levy and payment of corporate franchise taxes in Alabama. Based on the data furnished and the results calculated therefrom, the conclusion is inescapable that the Alabama franchise tax scheme as applied has in fact resulted in discrimination in favor of domestic corporations and to the detriment of foreign corporations, including the Taxpayers. (Richards' Affidavit, pp. 4-5) The overall results and conclusions of the Study for the years 1988-1991 are substantially applicable to the years 1982-1987. (Stip., Par. 66)

Adele Howell Shepherd of BellSouth and James D. Hanford of CSXT, both in-house accountants with the corporate responsibility for the corporate franchise taxes for their respective taxpayers, furnished to Richards for use in his Study all computations from their manual collection of data from the Department's records, including domestic franchise tax returns, domestic shares tax returns and domestic corporate income tax returns for the sampled corporations. (Affidavits of Shepherd and Hanford)

The data and computations furnished Richards were obtained from the data furnished by the Department. Department furnished boxes of computer printouts and later computer tapes of all domestic and foreign franchise taxpayers and domestic shares taxpayers. However, this information furnished was insufficient to develop corporation-specific computations, and to review each of the domestic franchise tax returns and domestic shares tax returns and corporate income tax returns for each of the domestic corporations would have been an insurmountable task requiring the manual review of franchise tax returns, shares tax returns and corporate tax returns for more than 40,000 domestic corporations for each of the years 1988-1991. In order to develop corporation-specific data, Dr. Richards was employed to develop a scientific sampling methodology from which to conduct a study to determine whether the Alabama franchise tax scheme was discriminatory between domestic and foreign corporations. Dr. Richards was furnished with data received from the Department in the form of computer tapes and printouts, and along with Mr. Ray Beard performed a frequency distribution of domestic corporations based on a ratio of each corporation's net worth to its total par value of capital stock. Based on the frequency distribution, Dr. Richards stratified the domestic corporation population for each year into 7 groups (the seventh stratum containing only Alabama Power Company). A sample size of 25 corporations for each of the 6 stratum for each of the 4 years (1988-91) was determined by Dr. Richards to present a statistically valid stratified random sample of Alabama domestic corporations; however, to insure the sample size requirement, Dr. Richards instructed Mr. Beard to draw a random sample of 100 corporations for each of the 6 strata

for each year. The distribution of the domestic corporations within the sample and by stratum is shown in Tables 2a-2c of the Study. (Affidavits, Shepherd and Hanford)

Based on the random sample drawn, Shepherd and Hanford manually pulled and had copied the domestic franchise tax returns, domestic shares tax returns and domestic income tax returns for each of 1,078 domestic corporations to complete the corporation-specific data for the entire sample population of domestic corporations. (Shepherd Affidavit, p. 8, Hanford Affidavit, p. 4) Shepherd and Hanford recorded the data and had performed the calculations based on the data contained therein of an "as if foreign" franchise tax liability with respect to each of these domestic corporations. The methodology developed to compute an "as if foreign" franchise tax liability was accurate and valid for the purpose of establishing a comparison between the domestic franchise tax as actually paid by the sample corporations and the "as if foreign" franchise tax liabilities of the same corporations. Both the methodology employed was proper and the result of the methodology was accurate. (Shepherd Aff., Par. 12, p. 20)

In developing the data, Shepherd and Hanford used the property allocation factor as the basis for the calculation of capital employed in Alabama. The total value of the corporation's property was obtained from the balance sheet and the property located outside Alabama was obtained from the domestic shares tax return, and subtracted from the book value of the total property. The remainder was Alabama property and was divided by the book value of the total property to obtain an apportionment or allocation percentage factor. (Shepherd Affidavit, *Apportionment*, pp. 17-18)

In developing the domestic shares tax, the computation was performed using the maximum millage rate in a county for the applicable tax year. Another computation was made using a statewide weighted composite average

millage rate provided by the Department. (Shepherd Affidavit, pp. 19-20) The Department's statewide average millage rate per county was used in the calculation set forth in Tables 5 & 6 of Richards' Study. Richards did additional calculations based on the county maximum millage rate, which produced substantially the same results. (Richards' Supplemental Affidavit)

Ernest Broadhead, Chief, Franchise Tax Division, Alabama Department of Revenue, upon review of the Richards' Study and the methodology of calclulating an "as if foreign" liability concluded that the sample should reveal an accurate comparison of the domestic corporation and itself as "as if foreign" corporation with the 1-factor formula (property) for allocation. Broadhead agreed that the results of the Richards' Study paralleled very closely the conclusions and results he made in his own studies, both in 1983 and 1988, and that it is a reasonable conclusion that from this study and his own studies on the basis of domestic franchise tax vs. foreign franchise tax in Alabama, the same corporation pays a substantially larger amount of franchise taxes if it is taxed on an "as if foreign" basis vs. a domestic basis. If the comparison is restricted to franchise tax only, there is unequal treatment with regard to the tax laws in Alabama between domestic and foreign corporations; and regarding those same corporations, if the domestic shares tax paid by a corporation is added to what was paid as domestic franchise tax (domestic franchise tax plus domestic shares tax), the sum of those figures would be the total tax the corporation has paid (whether it was required to pay it or not), and if the Study showed that the "as if foreign" franchise tax exceeded by two-fold the total amount of domestic franchise tax plus domestic shares tax for the same corporation, a foreign corporation would be paying a greater pro rata portion, approximately twice as much as between domestic franchise tax plus domestic shares tax and "as if foreign" franchise tax. (Broadhead Dep., pp. 97-100)

In his 1983 study, Broadhead used the same property factor for the purpose of allocating capital employed in Alabama. (Broadhead Dep., p. 103) Broadhead used the value of property employed in Alabama to develop the allocation factor, which is an accurate allocation factor insofar as it can be computed from the actual records and books of the domestic corporations, including tax returns. (Broadhead, p. 85-86) Broadhead did not quarrel with the accuracy of using the property factor as the sole factor, except that since it is taken from the shares tax return, the shares tax property factor is as of October 1 and the franchise tax is as of January 1, "theoretically they could be a little apart." (Broadhead, Dep., pp. 103-105)

Broadhead's 1983 study related primarily to the differences between the domestic franchise tax levied and the foreign franchise levied pursuant to their respective statutes, in which study the "as-if foreign" franchise tax was computed for the domestic corporations using the domestic financial statements and applying the foreign tax base and foreign tax rate set forth in § 40-14-41. The computation showed the amount of tax that would have been paid by the domestic corporations if they were in fact filing as foreign corporations. Based upon this comparison, the franchise tax paid by the domestic corporation on an "as if foreign" basis was substantially greater for the same corporations taxed as if foreign rather than domestic corporations. The "as if foreign" projected tax was 8 to 1 greater than the actual domestic franchise tax paid.[29] The use of a 100% allocation factor in that study to calculate the "as if foreign" franchise tax was not a

[29] In 1983, the franchise tax rate on domestic corporations was $3 per $1,000 applied to the par value of capital stock. Commencing in 1984, the domestic franchise tax rate was raised and has remained at $10 per $1,000, while the foreign franchise tax rate remained at $3 per $1,000. Despite the increase in the franchise tax rate, the discrimination remains at a ratio of 5 to 1. (Study, pp. 16-17, Table 5, p. 18)

significant factor and did not have any substantial effect on the comparative conclusion because the substantial majority of the capital being employed by domestic corporations would in fact be employed in Alabama overall. (Broadhead Dep., pp. 69-74; Taxpayers Exhibit 4)

In 1983, legislation was proposed to equalize the tax burden between domestic and foreign corporations, using the same tax base—capital employed in Alabama—and the same tax rate for both domestic and foreign corporations. At that time, Broadhead felt in "a lot of cases" the tax burden was unequal and in favor of domestic corporations to the detriment of foreign corporations. The average tax paid by the foreign corporations was greater than for domestic corporations. The legislation as initially proposed did not pass; instead of a hurriedly prepared legislative bill increasing the tax rate on domestic corporations from $3 per $1,000 to $10 per $1,000 and increasing the minimum tax from $25 to $50 was passed by the Legislature in 1983,[30] effective for the 1984 tax year. The purpose of this legislation was to generate more tax dollars to be paid by domestic corporations to tend to equalize the tax burden. This increase did not equalize the tax burden between domestic and foreign corporations as to the average tax paid by each. (Broadhead Dep., pp. 10-15)

In 1988 or 1989, a similar study comparing the actual total tax paid by the domestic corporations for the year 1988 with its "as if foreign" franchise tax, which used a sample of 143 corporations, 99 of which are domestic and 44 are foreign corporations. In making the "as if foreign" calculations, the Department had and utilized the actual allocation factor. This study (Taxpayers' Exhibit 5, Broadhead Dep.) showed the 99 domestic corporations by number, the par value of the capital stock, the unallocated capital employed, the actual allocation percentage, the total 1988 taxes paid by the domestic, including

[30] Act 83-745, Acts of Alabama 1983.

franchise, permit, domestic shares tax, license and permit and the "as if foreign" franchise tax and the difference by each corporations in comparing the total. The total tax paid by these 99 domestic corporations as domestics (franchise, shares and permits) was $382,969 compared to the total "as if foreign" franchise tax calculated on the actual allocation percentages was $7,690,108, with the same corporations paying on "as if foreign" franchise tax basis, $7,344,331 more in franchise tax than the total tax burden paid by that same domestic corporation. (Broadhead Dep., pp. 74-79; Taxpayers' Exhibit 5)

Methodology employed in the 1988-89 study was proper. The information was taken from the Department's records, including tax returns, and the actual amount of taxes paid as a domestic corporation was compared with the "as if foreign" franchise tax on capital employed in Alabama computed by using the actual allocation percentage. The allocation factor used was computed from the actual records and books of the domestic corporations, including their tax returns, and was an accurate allocation factor. (Broadhead Dep., pp. 85-86)

By comparing the same corporations as domestic and "as if foreign," any size discrepancy is eliminated because it is the same corporation. The use of the allocation percentages of capital employed in Alabama is the proper way to determine "as if foreign" tax base, which eliminates any objection that there was not an allocation because the allocation factor furnished by the Department was used. The data contained in Taxpayers' Exhibit 4, attachments B and C (Broadhead Dep.) is the data Department drew and collected for use in the 1988-89 study and is appropriate and proper data which employed the proper allocation factor. The resulting comparison of the domestic corporations as is and applying the proper allocation factor show a neutral relative amount of tax that is being paid by that corporation depending on whether it is taxed as a domestic or foreign corporation. (Broadhead Dep., pp. 80-81)

Taxpayers' Exhibit 8 (Broadhead Dep.) is a computer printout spread sheet prepared by the Department (and furnished to the Taxpayers) showing a comparison of 11 foreign corporations for the tax years 1988 through 1991, which shows par value, book value, stockholders' equity and capital employed in Alabama with the calculation of the tax due. By comparison of the foreign corporation designated 850001 calculated as if a domestic corporation would have had a par value tax base of $3,298 and paid a minimum of $50 tax for each of the years 1988-1991 as compared to the maximum tax of $25 paid as a foreign corporation. Corporation numbered 8500010 paid for the years 1988 through 1991, respectively, a foreign franchise tax of $1,565, $2,295, $1,877 and $2,025 as a foreign corporation, but as a domestic corporation, it would have paid the minimum tax of only $50 in each of those years based on the $1,000 par value of its stock. (Broadhead Dep., pp. 87-93)

With regard to the differential between domestic franchise tax and foreign franchise tax, Broadhead did not know of any legitimate state purpose of having a different tax base; nor of any legitimate state purpose that would justify a disapportionate burden of franchise between domestic corporations and foreign corporations; nor of any services which the State or any of its agencies provide foreign corporations not provided to domestic corporations; nor of any substantial cost incurred regarding foreign corporations that the State does not incur with regard to domestic corporations; nor of any rational basis as to why foreign corporations are taxed differently than domestic corporations other than that it is the law of Alabama. The foreign levy is more complex because it contains the elements of debt, accelerated depreciation, deferred taxes, surplus and retained earnings, and the interpretation of those capital components, which causes the tax return to be more complex and more costly to process and enforce than against a domestic corporation. If the foreign fran-

chise tax were done on a straight-out equity capital employed within the State, it would be no more complex than the domestic tax return would be. (Broadhead Dep., pp. 106-109)

Taxpayers employed as a tax accountant expert, Wayne White, Certified Public Accountant and partner in the firm of Arthur Andersen & Co. in its Birmingham office, who has been a practicing certified public accountant in Alabama with more than 20 years experience in Alabama state taxation of corporations, including domestic and foreign franchise taxes and corporate income taxes which are levied on the corporation and ad valorem taxes imposed on the shares of capital stock owned by shareholders of domestic and foreign corporations. White for more than 20 years has been regularly engaged by corporate clients to represent them in connection with Alabama taxation and before the Alabama Department of Revenue and worked extensively with Alabama state taxation of corporations. (White Affidavit, Pars. 1-2)

Based on his experience, the Alabama franchise tax scheme discriminates in favor of domestic (in-state) corporations to the detriment of foreign (out-of-state) corporations which do business in Alabama. The discrimination in favor of domestic corporations results primarily from the discriminatory differential treatment in the tax base. By statute—§ 40-14-40—the domestic franchise tax is levied "based on its capital stock," for which the Legislature has provided no further definition nor guidelines upon which to determine the tax base. The Department, without any statutory basis, has utilized and applied "par value" of capital stock as the domestic franchise tax base without legislative definition, standards or directions.

Domestic franchise taxes are, without any statutory basis, levied on a tax base of "par value" of capital stock of a domestic corporation (except where the stock is no-par, "stated value" is the tax base). Par value has no relationship to the actual value of the corporation's capital

stock. Domestic corporations can, and do, arbitrarily set and reduce the par value of the capital stock. Alabama no longer has a minimum capital requirement, and shares may have any par value or no-par value; and a "no-par" stock corporation could be recapitalized utilizing "par stock" to reduce domestic franchise taxes.

By contrast, foreign franchise taxes are levied under § 40-14-41 on a tax base of "the actual amount of capital employed in this state," consisting of the real or actual value of the corporation's capital stock, including surplus and retained earnings, plus long-term debt, certain related-party debt and accelerated depreciation. The Department has added an additional component by requiring the inclusion of "deferred taxes" (not included in the statute) within the total capital of a foreign corporation.

By virtue of the difference in the tax base, domestic corporations are undertaxed based on the improper application of the domestic franchise tax statute, resulting in foreign corporations paying their unfair share of the Alabama franchise tax burden. (White Affidavit, Par. 3-4) White had reviewed the Richards' Study and the methodology and opined that the methodology and Study are reasonable and reasonably reflect the computation of the "as if foreign" franchise tax liability for domestic corporations in Alabama, including the use of the property factor for allocating "capital employed" in Alabama. Based upon his experience, the results of Dr. Richards' Study confirmed White's own analysis and opinion that the Alabama franchise tax scheme discriminates in favor of domestic corporations and to the detriment of foreign corporations. (White Aff., Par. 7, pp. 9-10)

The amount of foreign franchise tax paid pursuant to § 40-14-41 by Taxpayers as foreign corporations and the amounts of refund claimed by each Taxpayer for each of the taxable years is set forth in the Statement of the Case, p. 6.

APPENDIX D

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

Case No. CV-89-2600 (with consolidation of
CV-90-1591, CV-90-1711, CV-91-397 and CV-91-1079)

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Plaintiffs

v.

STATE OF ALABAMA, STATE DEPARTMENT OF REVENUE,
Defendant

Case No. CV-90-2555 (with consolidation of
CV-90-2556, CV-90-2557, CV-90-2558 and CV-91-2151

CSX TRANSPORTATION, INC.,
Plaintiff

v.

STATE OF ALABAMA, STATE DEPARTMENT OF REVENUE,
Defendant

Consolidated as CV-89-2600-G

STIPULATED FACTS

1. Taxpayers, CSX Transportation, Inc. and all of its predecessor companies (collectively "CSXT") and South Central Bell Telephone Company and its successor by

merger, BellSouth Telecommunications, Inc. ("South Central Bell" or "South Central"), and BellSouth Corporation, BellSouth Services, Inc., BellSouth Financial Services Corporation, BellSouth Advertising & Publishing Corporation, BellSouth Resources, Inc., BellSouth Products, Inc., Alabama Cellular Services, Inc., Sunlink Corporation and TechSouth, Inc. and all of their predecessor companies (collectively "BellSouth Companies"), are classified as foreign corporations for the purpose of paying Alabama franchise tax pursuant to Ala. Code § 40-14-41(a).

2. For the purposes of Alabama franchise tax, CSXT, South Central Bell and BellSouth Companies are and each of their predecessor companies was a foreign corporation by reason of their state of incorporation being other than Alabama.

3. A foreign corporation, for the purposes of Alabama franchise tax, is any corporation under the laws of any state other than Alabama—"organized under the laws of any other state, nation or territory. . . ." Ala. Code § 40-14-41(a).

4. A domestic corporation, for the purposes of Alabama franchise tax, is any corporation organized under the laws of Alabama—"every corporation organized under the laws of this state. . . ." Ala. Code § 40-14-40.

5. All foreign corporations, including CSXT, South Central Bell and BellSouth Companies are required to file a franchise tax return and are required to pay Alabama franchise tax as a foreign corporation pursuant to Ala. Code § 40-14-41. Each foreign corporation doing business in Alabama pays franchise tax to the State of Alabama in an amount which is determined by applying the tax rate of $3.00 per $1,000 to the amount of capital employed in the State of Alabama by that corporation. Pursuant to statute, the amount of capital employed against which this tax rate is multiplied is the total actual value of the following items of capital employed by that foreign cor-

poration in the State of Alabama, subject to the exclusions and deductions from the tax base as set forth in Ala. Code § 40-14-41(d) and subject to the maximum tax base for public utilities and transportation companies, such as South Central Bell and CSXT, in the value of the sum of its tangible property located in Alabama and its intangible property employed in the conduct of its business in Alabama:

(a) Outstanding capital stock;

(b) Surplus and undivided profits;

(c) Long term debt;

(d) Certain related party debts; and

(e) Accelerated depreciation.

The Department required on the foreign franchise tax return that deferred income taxes be included as a separate item in the tax base.

6. The Alabama franchise tax is imposed upon foreign corporations pursuant to Ala. Code § 40-14-41 for the privilege of doing business within the State of Alabama.

7. Art. XII, § 232, Constitution of Alabama of 1901, provides for and authorizes the levy of a franchise tax on foreign corporations "based on the actual amount of capital employed in this state."

8. Art. XII, § 232, Constitution of Alabama of 1901, does not define "capital employed in this state."

9. The Alabama franchise tax imposed upon domestic corporations pursuant to Ala. Code § 40-14-40 is computed by applying the tax rate of $10 per $1,000 to the amount of the par value of the capital stock of the corporation with "par value" capital stock and to the amount of the stated value of the capital stock of the corporation with "no-par" capital stock.

10. Art. XII, § 229, Constitution of Alabama of 1901, provides for and authorizes the levy of a franchise tax on domestic corporations "in proportion to the amount of capital stock."

11. The tax base used for the Alabama domestic franchise tax does not include the book value or the market value of the domestic corporation's capital stock.

12. The Alabama franchise tax imposed pursuant to Ala. Code § 40-14-40 upon domestic corporations is not computed by applying the applicable tax rate multiplied by the book value or market value of the capital stock of the domestic corporation.

13. The tax base upon which Alabama franchise tax is imposed pursuant to Ala. Code § 40-14-40 upon domestic corporations does not include surplus and undivided profits, long-term debt, the amount of certain related party debt, or the accelerated depreciation of the domestic corporation, or deferred taxes, which are not factors in determining the amount of franchise tax to be paid by a domestic corporation.

14. The tax base of foreign corporations for the purpose of determining the amount of Alabama franchise tax to be paid by foreign corporations pursuant to Ala. Code § 40-14-41, includes the value of items of capital not included in the franchise tax base of domestic corporations for the purpose of determining the amount of Alabama franchise tax to be paid by domestic corporations pursuant to Ala. Code § 40-14-40.

15. Capital stock upon which tax base domestic corporations pay Alabama franchise tax for the privilege of corporate existence in and under the laws of Alabama is not defined in either Art. XII, § 229, AL. CONST. or Ala. Code § 40-14-40.

16. "Capital stock" upon which tax base domestic corporations pay Alabama franchise tax is not defined in

either Art. XII, § 229, AL. CONST. 1901 or Ala. Code § 40-14-40, to require the levy of the domestic franchise tax base solely upon the par value or stated value of a domestic corporation's capital stock.

17. Department and Commissioner have for the purposes of determining the franchise tax levied on a domestic corporation pursuant to Ala. Code § 40-14-40 based the levy of such tax solely upon the par value of the capital stock of each domestic corporation with "par value" capital stock and to the amount of the stated value of the capital stock of the corporation with "no-par" capital stock.

18. Department and Commissioner for the purposes of determining the franchise tax on foreign corporations, including CSXT, South Central Bell and BellSouth Companies, pursuant to Ala. Code § 40-14-41 have based the levy on the value of capital employed in the State of Alabama, including the outstanding capital stock, surplus and undivided profits, long-term debt, certain related party debts and accelerated depreciation. The Department required on the foreign franchise tax return that deferred income taxes be included as a separate item in the tax base.

19. The par value of shares of capital stock of a domestic corporation does not represent the book value or market value of the capital stock of the domestic corporation as a going concern.

20. The stated value of shares of capital stock of a domestic corporation does not represent the book value or market value of the capital stock of the domestic corporation as a going concern.

21. A corporation organized under the laws of Alabama may control the amount of its domestic franchise tax levied pursuant to Ala. Code, § 40-14-40, by assigning as the "par value" or "stated value" of its capital stock any value selected by it.

22. Under the corporate laws of Alabama, a corporation organized under the laws of this state may by its own action incorporate with a minimal amount assigned as "par value" and may thereafter increase or decrease the "par value" of its capital stock.

23. Under the corporate laws of Alabama, a corporation organized under the laws of this state may by its own action incorporate with a minimal amount assigned as "stated value."

24. A domestic corporation can reduce the amount of franchise tax paid by it pursuant to Ala. Code § 40-14-40 by reducing the par value of its capital stock.

25. A foreign corporation doing business in the State of Alabama cannot reduce the amount of Alabama franchise taxes paid by it pursuant to Ala. Code § 40-14-41 by reducing the par value of its capital stock or the stated value of its capital stock.

26. A foreign corporation doing business in the State of Alabama cannot reduce the actual amount of its capital employed in Alabama by reducing the par value of its capital stock or the stated value of its capital stock.

27. CSXT, South Central Bell and BellSouth Companies and other foreign corporations who engage in business within Alabama are required to pay taxes on the tax base set forth in Ala. Code § 40-14-41 by virtue of the fact that they are organized in a state other than the State of Alabama.

28. Department and Commissioner have levied Alabama franchise taxes on domestic corporations pursuant to Ala. Code § 40-14-40 based on a tax base of the "par value" of the shares of capital stock of domestic corporations or the "stated value" for domestic corporations with no-par stock, while levying the Alabama franchise tax on CSXT, South Central Bell and BellSouth Companies and other foreign corporations engaging in business within Ala-

bama pursuant to Ala. Code § 40-14-41, based on the value of capital employed in the State of Alabama by each of the foreign corporations which tax base includes the actual value of the outstanding stock, surplus and undivided profits, long-term debt, certain related party debts and accelerated depreciation and deferred taxes, subject to the exclusion and deductions set forth in § 40-14-41(d), and subject to the maximum tax base for public utilities and transportation companies, such as CSXT and South Central Bell Telephone Company, in the value of the sum of its tangible property located in Alabama and its intangible property employed in the conduct of its business in Alabama.

29. The Department and Commissioner use "par value" of capital stock as the sole tax base for domestic corporations which have par value stock, and "stated value" of capital stock as the sole tax base for domestic corporations which have no par value capital stock.

30. For the tax year 1991, each of the following BellSouth Companies timely filed its foreign franchise tax return for 1991 and on or before March 15, 1991, paid under protest the foreign franchise taxes calculated by it to be due for the year 1991 in accordance with the formula set forth in Ala. Code § 40-14-41, as follows:

South Central Bell	$5,241,572.00
BSResources	2,720.00
BSFinancial	28,538.90
BSServices	206,333.00
BAPCO	75,412.00
AlaCell	64,880.00
BSProducts	2,753.00
TechSouth	3,147.00
Sunlink	24,108.00

31. Each of the copies of the franchise tax returns of each of the Taxpayers attached as Exhibit "A" to the Complaint in CV-91-1079-Th is a true and correct copy of the actual return and each check attached is a true and correct copy of the check by which the estimated payment of 1991 foreign franchise taxes paid by each of these Taxpayers was made under protest.

32. All of the statements, allegations and amounts of foreign franchise taxes paid set forth in Paragraph 7 of the Complaint for declaratory judgment and refund of taxes paid under protest in Civil Action CV-91-1079-Th, together with all exhibits attached to said complaint are true, correct and accurate.

33. For the tax year 1990, South Central timely filed its foreign franchise tax return and the Department entered a final assessment of foreign franchise taxes in the amount of $5,409,568.03, and on August 28, 1990, South Central timely perfected its appeal and contemporaneously paid the Department the amount of $5,411,198.31 in full payment of said final assessment plus interest before the same became delinquent.

34. The copy of Exhibit A attached to the complaint in CV-90-1711-P is a true and correct copy of the notice of appeal with an attached true and correct copy of the final assessment for 1990 foreign franchise taxes calculated by the Department to be due for the year 1991 in accordance with the formula set forth in Ala. Code § 40-14-41.

35. For the tax year 1990, each of the following BellSouth Companies timely filed is foreign franchise tax return for 1990 and on or before June 15, 1990, paid under protest the foreign franchise taxes calculated by it to be due for the year 1991 in accordance with the formula set forth in Ala. Code § 40-14-41, as follows:

BS Corp	$ 17,495.06
BSServices	205,524.69
BSFinancial	16,908.24
BAPCO	71,860.77
BSResources	4,575.77
AlaCell	45,068.83
Sunlink	37,952.33
TechSouth	3,610.25

36. Each of the copies of the franchise tax returns of each of the Taxpayers attached as Exhibit "A" to the complaint in CV-90-1591-G is a true and correct copy of the actual return and each check attached is a true and correct copy of the check by which the payment of the 1990 foreign franchise taxes paid by each of these Taxpayers were made under protest. Each of the copies attached as Exhibit "B" to the complaint in CV-90-1591-G is a true and correct copy of the letter from the Department acknowledging receipt of each of the 1990 franchise tax payments as a payment under protest.

37. For the tax year 1989, South Central timely filed its foreign franchise tax return for 1989, and the Department made a final assessment against South Central for 1989 foreign franchise taxes in the amount of $5,219,546 and on December 15, 1989, South Central paid to the Department the amount of $5,219,546 in full payment of said final assessment before the same became delinquent and contemporaneously timely filed its Notice of Appeal.

38. Each of the Exhibits "A" through "E", inclusive, attached to the complaint in CV-89-2600-G is a true and correct copy of the items set forth and defined in the complaint.

39. For each of the tax years 1986, 1987 and 1988, South Central timely filed its foreign franchise tax return

and paid foreign franchise taxes calculated by it to be due for each of the years in accordance with the formula set forth in Ala. Code § 40-14-41, as follows:

Year	*Amount of Tax Paid*	*Date Tax Paid*
1986	$4,952,692.00	August 25, 1986
1987	$4,995,844.00	July 16, 1987
1988	$4,927,214.00	August 16, 1988

40. All of the statements, allegations and amounts of foreign franchise taxes paid in Paragraphs 3, 4 and 5 of the complaint and petition for judicial review in Civil Action CV-91-397-G, together with Exhibits "A", "B" and "C" attached to said complaint, are true, correct and accurate.

41. For the tax year 1991, CSXT filed its foreign franchise tax return and the Department made a final assessment against CSXT for 1991 foreign franchise taxes in the total amount of $715,058.14 representing franchise tax in the amount of $571,326.67 with a penalty in the amount of $117,376.20 and interest in the amount of $26,355.27. CSXT timely perfected its appeal and filed its supersedeas bond. On August 31, 1992, CSXT paid unto the State the total amount of $649,017.98 representing payment in full of the tax assessed in the amount of $571,326.67 plus interest in the amount of $77,691.31 through August 31, 1992, and the State waived and remitted all penalties for the tax year 1991, and accepted the foregoing payment as payment in full of the final assessment of, and the liability for, foreign franchise taxes levied against CSXT for the year 1991 plus all interest due thereon, subject to the right of CSXT to a refund of all or any portion of said taxes and interest.

42. The copy of Exhibit "D" attached to the complaint in CV-91-2151-G is a true and correct copy of the notice of appeal with an attached true and correct copy of the final assessment for 1991 foreign franchise taxes calculated

by the Department to be due for the year 1991 in accordance with the formula set forth in Ala. Code, § 40-14-41.

43. For the tax year 1990, CSXT filed its foreign franchise tax return for 1990, and the Department made a final assessment against CSXT for 1990 foreign franchise taxes in the amount of $662,737.62 representing franchise tax in the amount of $573,792.00 with a penalty in the amount of $46,406.41 and interest in the amount of $42,539.21. CSXT timely perfected its appeal and contemporaneously therewith filed its supersedeas bond before the final assessment became delinquent. On August 31, 1992, CSXT paid unto the State the total amount of $714,935.68 representing payment in full of the tax assessed in the amount of $573,792.00 plus interest in the amount of $141,143.68 through August 31, 1992, and the State waived and remitted all penalties for the tax year 1990, and accepted the foregoing payment as payment in full of the final assessment of, and the liability for, foreign franchise taxes levied against CSXT for the year 1990 plus all interest due thereon, subject to the right of CSXT to a refund of all or any portion of said taxes and interest.

44. The copy of Exhibit "E" attached to the complaint in CV-90-2556-G is a true and correct copy of the notice of appeal with an attached true and correct copy of the final assessment for 1990 franchise taxes calculated by the Department to be due for the year 1990 in accordance with the formula set forth in Ala. Code, § 40-14-41.

45. For the tax year 1989, CSXT filed its foreign franchise tax return and Department entered a final assessment of foreign franchise taxes against CSXT in the amount of $800,324.17 representing franchise tax in the amount of $574,252.31 with a penalty in the amount of $115,353.92 and interest in the amount of $110,717.94. CSXT timely perfected its appeal and contemporaneously filed its supersedeas bond before the same became delinquent. On August 31, 1992, CSXT paid unto the State

the total amount of $781,556.10 representing payment in full of the tax assessed in the amount of $574,252.31 plus interest in the amount of $207,303.79 through August 31, 1992, and the State waived and remitted all penalties for the tax year 1989, and accepted the foregoing payment as payment, in full of the final assessment of, and the liability for, foreign franchise taxes levied against CSXT for the year 1989 plus all interest due thereon, subject to the right of CSXT to a refund of all or any portion of said taxes and interest.

46. The copy of Exhibit "E" attached to the complaint in CV-90-2555-G is a true and correct copy of the notice of appeal with an attached true and correct copy of the final assessment for 1989 foreign franchise taxes calculated by the Department to be due for the year 1989 in accordance with the formula set forth in Ala. Code § 40-14-41.

47. For the tax years 1986, 1987 and 1988, CSXT timely filed its foreign franchise tax return and paid foreign franchise taxes for each of the years in accordance with the formula set forth in Ala. Code, § 40-14-41, as follows:

Year	*Amount of Tax Paid*	*Date Tax Paid*
1986	$555,951.00	November 14, 1986
1987	$557,066.00	August 13, 1987
1988	$570,472.00	August 23, 1988

Petition for refund was timely filed for each of the years 1986, 1987 and 1988, and the appeal from final notice of the denial of said foreign franchise tax refunds was timely filed.

48. All of the statements, allegations and amounts of foreign franchise taxes paid as set forth in Paragraphs 3 and 4 of the complaint and petition for judicial review in CV-90-2557-G, together with Exhibits "A", "B" and "C" attached to said complaint are true, correct and accurate.

49. For each of the tax years 1982, 1983, 1984 and 1985, CSXT or its predecessors timely filed its foreign franchise tax return and paid foreign franchise taxes for each of the years in accordance with the formula set forth in Ala. Code, § 40-14-41, as follows:

Year 1982	Seaboard Coast Line Railroad Company	$108,333.00
Year 1982	Louisville & Nashville Railroad Company	$316,667.00
Year 1983	Seaboard System Railroad, Inc.	$396,319.00
Year 1984	Seaboard System Railroad, Inc.	$461,374.00
Year 1985	Seaboard System Railroad, Inc.	$578,544.00

Petition for refund was timely filed for each of the years 1982, 1983, 1984 and 1985, and the appeal from final notice of the denial of said foreign franchise tax refunds was timely filed.

50. All of the statements, allegations and amounts of franchise taxes paid as set forth in Paragraph 3, 4 and 5 of the complaint and petition for judicial review in Civil Action CV-90-2558-G, together with exhibits "A", "B" and "C" attached to said complaint are true, correct and accurate.

51. On September 8, 1961, upon the passage of Act No. 912, the tax base for foreign corporations first included surplus and undivided profits.

52. On September 8, 1961, upon the passage of Act No. 912, the tax base for foreign corporations first included long-term debt.

53. On September 8, 1961, upon the passage of Act No. 912, the tax base for foreign corporations first included related party debt.

54. On September 8, 1961, upon the passage of Act No. 912, the tax base for foreign corporations first included accelerated depreciation.

55. After September 8, 1961, upon the passage of Act No. 912, the following factors, in addition to outstanding capital stock, have constantly remained a part of the foreign franchise tax base:

(a) surplus and undivided profits;

(b) long-term debt;

(c) related party debt; and

(d) accelerated depreciation.

56. "Par value" of the corporate stock of domestic corporations has been used by the Department during the tax years 1982 through 1991 as the tax base upon which domestic franchise taxes are applied or calculated.

57. "Par Value" does not appear in the statute—Ala. Code, § 40-14-40—levying Alabama franchise tax on domestic corporations.

58. The statute levying Alabama franchise tax—Ala. Code, § 40-14-40—on domestic corporations does not require the use of other than actual value of the corporate stock of domestic corporations.

59. A change in par value of capital stock of a foreign corporation will not have any effect on its Alabama franchise tax base or the amount of Alabama foreign franchise tax levied on it.

60. The statute levying Alabama franchise tax on domestic corporations does not refer to actual book value of the corporate stock of domestic corporations.

61. The franchise tax base for foreign corporations is increased as it retains profits or accumulates surplus.

62. The franchise tax base for foreign corporations is increased as it utilizes accelerated or other method of depreciation so that its depreciation reserve exceeds depreciation computed on the basis of the useful life of its depreciable property.

63. An increase in indebtedness will increase the franchise tax base for foreign corporations if the increase indebtedness is long term or involves debt to a parent or subsidiary which is not also required to pay a franchise tax in Alabama.

64. The tax base utilized by the Department for foreign corporations includes deferred taxes and the tax base is increased as deferred taxes of foreign corporation increase.

65. In the collection of foreign franchise taxes, the Department of State of Alabama can perfect a lien on or levy against the "capital employed in this state" of foreign corporations.

66. The overall results and conclusions of the study performed by Dr. Larry Richards for the years 1988-1991 are substantially applicable to the years 1982-1987.

67. The total amount of foreign franchise tax on foreign franchise taxes collected for the following tax years:

Year	*Foreign Collections*
1990	$ 84,250,744.00
1991	$ 96,290,249.00
1992	$107,612,319.00

The franchise tax collected was distributed pursuant to § 40-14-43, *Code of Alabama 1975*, in the following proportions: General Fund, 77%; Public Welfare Trust Fund, 16.35%; County, 6.65%.

68. If the franchise tax levy against foreign corporations is invalidated and if the Court orders refunds to Taxpayers in this case, the State of Alabama could potentially be liable for foreign franchise tax refunds to all foreign franchise taxpayers for three years. In the event all foreign corporations become entitled to immediate payment of refunds of the total amount of the foreign franchise taxes paid for 1990-1992, the consequences to the State of Alabama would be significant and such refunds would have a substantial detrimental effect on state services provided from the general fund and the public welfare trust fund and services provided by the several counties.

CSX TRANSPORTATION, INC.; SOUTH CENTRAL BELL TELEPHONE COMPANY and its successor by merger, BELLSOUTH TELECOMMUNICATIONS, INC.; BELLSOUTH CORPORATION; BELLSOUTH SERVICES, INC.; BELLSOUTH FINANCIAL SERVICES CORPORATION; BELLSOUTH ADVERTISING & PUBLISHING CORPORATION; BELLSOUTH RESOURCES, INC.; BELLSOUTH PRODUCTS, INC.; ALABAMA CELLULAR SERVICES, INC.; SUNLINK CORPORATION; and TECHSOUTH, INC.

By /s/ Walter R. Byars
WALTER R. BYARS
Attorney for Plaintiffs

Of Counsel:

STEINER, CRUM & BAKER
P. O. Box 668
Montgomery, AL 36101

STATE OF ALABAMA DEPARTMENT OF REVENUE and STAN MCDONALD As Commissioner of Revenue

By /s/ Ron Bowden
RON BOWDEN
Attorney for Defendants

Department of Revenue
Legal Division
P. O. Box 320001
Montgomery, AL 36132-0001

APPENDIX E

STEINER, CRUM & BAKER
Montgomery, Alabama 36101-0668

January 19, 1990

Judge William R. Gordon
Montgomery County Courthouse
Montgomery, Alabama 36192

Re: South Central Bell Telephone Company v. State of Alabama, Department of Revenue, Civil Action No. CV-89-2600-G

Dear Judge Gordon:

The foregoing is an appeal from an assessment against South Central Bell Telephone Company for 1989 foreign franchise taxes levied pursuant to § 40-14-41, Code 1975. The taxpayer has filed its complaint in order to comply with the Alabama Administrative Procedures Act. However, both the taxpayer and the State Department of Revenue desire that further proceedings with regard to this appeal be held in abeyance pending a final disposition of the *Reynolds* and *GMAC* cases, whether that be at the rehearing stage before the Alabama Supreme Court or by judicial review in the U. S. Supreme Court. However, if either party desires to proceed at a later date, with the Court's permission, this case would be activated.

Accordingly, on behalf of the taxpayer and the Department, I hereby respectfully request that the foregoing appeal be placed on the administrative docket or otherwise held in abeyance pending further notification of the Court.

Respectfully submitted,

STEINER, CRUM & BAKER

By /s/ Walter R. Byars
WALTER R. BYARS
Attorney for South Central
Bell Telephone Company

WRB:mel
cc: Mr. Ron Bowden

APPENDIX F

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR MONTGOMERY COUNTY
MONTGOMERY, ALABAMA

Civil Action Case No. CV-89-2600
(With Consolidation of CV-90-1591,
CV-90-1711, CV-91-397 and CV-91-1079)

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Plaintiffs,

vs.

STATE OF ALABAMA, STATE DEPARTMENT OF REVENUE,
Defendant.

Civil Action Case No. CV-90-2555
(With Consolidation of CV-90-2556
CV-90-2557, CV-90-2558 and CV-91-2151)

CSX TRANSPORTATION, INC.,
Plaintiff,

vs.

STATE OF ALABAMA, STATE DEPARTMENT OF REVENUE,
Defendant.

COURT REPORTER'S TRANSCRIPT
OF PROCEEDINGS
December 14, 1995
Montgomery County Courthouse
Courtroom 3-B

Before: THE HONORABLE WILLIAM R. GORDON
Circuit Judge

* * * *

[129] ADELE HOWELL SHEPHERD,

A witness, after having first been duly sworn to speak the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. BYARS:

Q. Please state your name and address.

A. My name is Adele Howell Shepherd and I reside in Atlanta, Georgia.

Q. And by whom are you employed and what capacity?

A. Since 1984 I have been employed by BellSouth Corporation as the director over taxes. In that capacity I'm responsible for research, audit and compliance for taxes other than income taxes for BellSouth Corporation in its unregulated subsidiaries. My staff files the Alabama franchise tax return for those companies.

Q. Really for most BellSouth Companies?

A. Yes.

Q. Please state your educational background.

A. I received a bachelor's degree, a B. A. degree from Randolph [130] Macon Woman's College in 1967, a Master of Science degree from Boston University in 1972, and a Master of Professional Accountancy degree from Georgia State University in Atlanta in 1974.

Q. After getting your master's at Georgia State, did you take and pass the CPA exam?

A. I did.

Q. When was that?

A. 1975.

Q. Please give us your employment background.

A. Since 1972, I have been employed by various Bell Companies. I started work for Southern Bell. After I

finished my master's and passed the CPA exam, I transferred into the tax department at Southern Bell in 1976. In 1978 I went into internal auditing where I had an assignment to work on the intercompany audit of companies that file federal income tax returns consolidated with AT&T. I subsequently transferred to AT&T from the federal income tax audit. In 1982 I came back to Southern Bell as district manager of taxes where I was responsible for taxes other than income taxes and property taxes for Southern Bell. That would be things like sales tax, gross receipts tax, intangible taxes, franchise taxes, that type of thing.

Q. Does that include the Alabama franchise tax?

A. Uh-huh.

[131] Q. When did you first become aware of the litigation that's known as the *White* case or *White v. Reynolds Metals Company*?

A. After the Montgomery Circuit Court had resolved the issues and issued a judgment.

Q. Okay. You were the person involved and responsible for Alabama franchise taxes; is that correct, at that time?

A. For the companies.

Q. Yes. And at that time was there anyone within the company as far as you know that was aware of that litigation until after it was decided by this Court?

A. No.

Q. Let me ask you this. With respect to BellSouth, each of these questions will be with respect to BellSouth or any affiliated companies that are the taxpayers or any of the affiliates, are any of them a party to the *White* litigation?

A. No.

Q. Any aligned, affiliated, associated or connected in any way with the taxpayers in that case Reynolds Metals Company, General Motors Corporation, General Motors Acceptace Corporation or GMAC Leasing Corporation?

A. No.

Q. Did any of the Bell Companies participate in the litigation at all?

A. No.

Q. Did any of them authorize any of the taxpayer litigants in [132] the White case to represent their interest in the litigation?

A. No.

Q. Did any of them share in any of the legal or other expenses of the taxpayer litigants associated with the prosecution of the White case?

A. No, they didn't.

Q. Did any of them participate or have an opportunity to be present or present evidence or arguments in any challenge of the Alabama franchise tax levied upon them as foreign corporations?

A. No.

Q. Did any of them control or take an active part in the conduct of the White case?

A. No, they did not.

Q. Were any of them aware of the thrust of the challenges made in the White litigation until after the decision of this Court?

A. They were not.

Q. Ms. Shepherd are you aware of the operations of the BellSouth Companies that are parties to this?

A. I am.

Q. Are you also aware of the Alabama franchise tax returns of all the BellSouth taxpayers who are litigants in this litigation?

* * * *

[188] JAMES D. HANFORD

A witness, after having first been duly sworn to speak the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. BYARS:

Q. Would you please state your name and address?

A. My name is James D. Hanford. I reside in Jacksonville, Florida.

Q. By whom are you employed and in what capacity?

A. I'm employed by CSX Corporation in the capacity of senior director of state income and sales taxes.

Q. How long have you had that job, and what were the responsibilities?

[189] MR. BYARS: Yes, sir?

THE COURT: I am having a little trouble hearing him.

Q. Speak up, please, Mr. Hanford. How long have you served in this position and what are your main responsibilities?

A. I have served in this position since October 1, 1986. My principal functions are planning, compliance and audits associated with non-property state taxes, such as corporate income, franchise and sales and use tax for CSX Corporation and all of its related companies including CSX Transportation, Inc.

Q. CSX Transportation, Inc. is a taxpayer who is challenging in this case; is that correct?

A. Yes.

Q. Please state your education and employment background.

A. I earned a bachelor's degree from Northern Illinois University in 1974. I have been a certified public accountant since 1976. Prior to working for CSX Corporation, I was employed by the Bessemer Railroad in the capacity of manager of income taxes, responsible for all federal and state income tax matters for that company.

Q. How much experience have you had in the area of state taxation, and in particular Alabama franchise tax?

A. I have thirteen years of experience in the area of state taxation. Seven years of experience in the area of

state franchise taxes, including the Alabama franchise tax.

[190] Q. Are you familiar with the operations of CSXT or Transportation in Alabama and also its Alabama franchise tax returns?

A. Yes, I am. I'm familiar with CSXT in the sense that I filed a foreign franchise tax return in Alabama. During the time that I have been with CSX, I have been responsible for that filing. CSX is a corporation authorized to do business in Alabama and engages in interstate commerce.

Q. How long have you been involved in those filings?

A. I have been involved with the Alabama franchise tax filings since 1989.

Q. And were you also a participant in the preparation of the challenges to this particular franchise tax—this case?

A. Yes, I was.

Q. In connection with the challenges did CSX and other taxpayers employ an expert to assist them in a statistical study?

A. Yes, we employed Dr. Larry Richards the chairman of the Decision Sciences Department on School of Business for the University of Oregon who is an expert statistician and is very familiar with the planning and conduct of the statistical studies specifically in the area of taxation.

Q. What role did you plan in connection with this?

A. I was assigned to a team along with Adele Sheppard. And our principal duty was to gather data to be used by Dr. Richards [191] in performing his study in order to determine whether or not the Alabama franchise tax scheme discriminated against foreign corporations and in favor of domestic corporations.

Q. Did you participate with Adele Shepherd in the accumulation and recording of data taken from productions made by the State of Alabama?

A. Yes, I did.

Q. Were you and Adele Shepherd able to ascertain all the data elements required to compute an "as if" franchise tax liability for each and every domestic corporation?

A. No, we were not. We determined that to be impractical. When you look at the number of domestic corporations in Alabama, the number of tax returns that will need to be pulled and the data that would have to be accumulated, it was just an impossible task in our opinion.

Q. Did you resolve this by having Dr. Richards to design a scientific random sample?

A. Yes.

Q. Have you been here in the courtroom as the representative of CSXT and heard the testimony of Mrs. Adele Shepherd with regard to the procedure and methodology employed in the collection and development of data to support the analysis performed by Dr. Richards?

A. Yes, I have been in the courtroom representing CSX. And yesterday I listened to Adele Shepherd's testimony. And I [192] concur with her testimony in regard to our accumulation of data.

Q. In your professional opinion as a CPA, are the data collected and methodology used by you both accurate and appropriate?

A. Yes, that is my opinion.

Q. With regard to the White litigation, I will ask each of these questions with regard to CSX and any of its affiliated companies. Were any a party at any level to the litigation to proceedings in the Alabama courts that resulted in the Alabama Supreme Court decision in White against Reynolds Metals?

A. No.

Q. Did you participate in the litigation or in the development of the evidence at any level in that case?

A. No.

Q. Aligned, affiliated or associated or connected in any way with the taxpayer litigants in that case Reynolds

Metals Company, General Motors Corporation, General Motors Acceptance, GMAC Leasing Corporation?

A. No.

Q. Did you authorize any of the taxpayer litigants in the White case to represent the interest of CSXT in that litigation?

A. No.

Q. Share in any of the legal or other expenses of the taxpayer [193] litigants associated with the prosecution of the White litigation at any level?

A. No.

Q. Participate or have opportunty to be present or to present evidence and arguments in challenge of the Alabama franchise tax levied upon CSXT as a foreign corporation or upon those litigants as foreign corporations?

A. No.

Q. Control or take an active part in the conduct of the White litigation?

A. No.

Q. In your capacity as senior director of state taxes for CSX, were you responsible for the state franchise taxes, including Alabama, and the challenges to those taxes by CSX?

A. Yes.

Q. When did you first become aware of the White litigation challenging the Alabama franchise tax scheme?

A. I became aware of the White litigation when the Montgomery court—Montgomery County Circuit Court issued its decision in that case.

Q. Finally, I want to ask you a few questions about CSX Transportation demographics. What the the total assets and revenues of your company?

A. The total assets of CSX Transportation in Alabama are $838,000,000.00. The total revenues of the CSX [194] Transportation in Alabama is $270,000,000.00.

Q. How many people does CSXT, I will call it, employ in the state of Alabama?

A. The CSXT employs 1,118 employees in Alabama.

Q. What is the annual amout of capital expenditures of CSX Transportation in Alabama?

A. Our annual construction budget in Alabama is $20,000,000.00.

Q. And for 1994 what was the Alabama foreign franchise tax levied against CSXT?

A. $539,000.00.

Q. Mr. Hanford, has CSX considered the potential impact on the State of Alabama of pursuing its franchise tax lawsuit to a successful conclusion?

A. Yes, we have. We are aware of the State of Alabama's need to generate revenues in order to fund the operations of the State. But at the same time we feel that the taxes employed to generate that revenue should be equitable to all that are affected. We also are appreciative of the impact of this case on the State of Alabama. And CSX Transportation would like to be a good corporate citizen and pay its fair share of taxes in Alabama but no more than its fair share. In light of that, we have made it known that we would be willing to accept credits instead of cash refunds if this Court decides that refunds are appropriate in order to minimize the impact on the State and at the same time that would equalize the [195] franchise tax burden on foreign and domestic corporations in Alabama.

Q. When you say credit, is that credit against future tax liabilities?

A. Yes, sir, for a specific number of years.

MR. BYARS: That's all I have.

APPENDIX G

Ala. Code § 40-1-11 (1975) (repealed 1992) provided:

§ 40-1-11. Payment under protest—Authorized; procedure for recovery.

Whenever any taxpayer claims that any tax, except ad valorem taxes, levied under the provisions of this title as fixed by the officer authorized to collect same is excessive or is invalid, either in whole or in part, the taxpayer shall pay such tax under protest, and the officer receiving the same shall note on the receipt that such tax was paid under protest. The taxpayer shall commence an action against the officer for the recovery of such excessive or invalid tax, as the case may be, within 60 days after the payment thereof under protest, and unless such action is commenced within that period of time for the recovery of the amount of taxes claimed to be excessive or invalid, the taxpayer shall be deemed to have waived the payment of such taxes under protest and to have thereby become a voluntary taxpayer. If an action is filed for the recovery of any taxes paid under protest within the specified period of time and it is determined upon a hearing of the case that any part of the taxes so paid is excessive or illegal, the same shall be refunded as provided in section 40-1-12. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 890; Acts 1943, No. 402, p. 369.)

Ala. Code § 40-1-12 (1975) (repealed 1992) provided:

§ 40-1-12. Same—Disposition of funds.

Whenever any money is paid to any officer authorized to receive or collect same, as taxes paid under protest, such officer shall certify such sum of money to the state treasury, with notice to the treasurer that said sum of money was paid under protest by the identified taxpayer, and it shall be the duty of the treasurer to hold such sum of money in an identified suspense account until it is judicially determined whether the taxes were legally levied and collected or the taxpayer abandons the recovery of the money by failure to bring an action within the period of 60 days after the payment thereof. The treasurer shall give notice to the comptroller that such funds are set up in a suspense account and are therefore not available for allotment, allocation or disbursement until the validity of the assessment and collection is determined by the court. If it is determined by the court, on an action brought by the taxpayer, that any portion of the taxes paid under protest was excessive or illegally assessed and collected, the comptroller shall issue his warrant upon the treasurer for a refund of such sum as may have been determined by the court to be excessive or invalid, and the remainder of such fund, if any, shall be allocated and disbursed as authorized by law. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 891; Acts 1943, No. 402, p. 369.)

Ala. Code § 40-1-34 (1975) (repealed 1992) provided:

§ 40-1-34. Refund on overpayment made directly to department of revenue.

Where any taxpayer in the payment of taxes or licenses which are paid directly to the department of revenue, by a mistake of fact or law has paid an amount in excess of the amount due or has made an erroneous payment, the comptroller is authorized to draw his warrant on the treasurer in favor of such taxpayer, and the treasurer is authorized to pay such warrant for the amount of such overpayment or erroneous payment.

Before any refund under this section can be made, the taxpayer, his heirs, successors or assigns shall file in duplicate a petition directed to the department of revenue, setting up the fact relied on to procure the refunding of the money erroneously paid. Such application must be made within three years from the date of such payment.

The department of revenue shall examine said petition and the records of the department of revenue, and if the facts set forth in the petition are such as to entitle the petitioner to the refunding of the money as prayed for and the department of revenue, upon the evidence adduced, is satisfied that the petitioner is entitled to the refund as prayed for, he shall so certify to the comptroller stating the amount to be refunded by the state, the particular fund on which such warrant shall be drawn and forward to the comptroller a copy of the petition with the certificate attached, and if the comptroller shall be satisfied that the petition is in form required by law, he shall draw his warrant on the treasurer as hereinbefore provided for the amount certified to him by the department of revenue. (Acts 1931, No. 432, p. 527; Code 1940, T. 51, § 913; Acts 1951, No. 852, p. 1481, § 1.)

Ala. Code § 40-2-22 (1975) (repealed 1992) provided:

§ 40-2-22. Appeals from final assessments—Right; procedure generally; effect of final judgment.

Either the state or the taxpayer may appeal from any final assessment made by the department of revenue under any assessment required by law to be made by the department of revenue. If the appeal is by the state, such appeal shall be made by the attorney general filing the written notice with the secretary of the department of revenue and with the clerk or register of the circuit court of Montgomery county within 30 days after such assessment is made final. The department of revenue shall immediately give notice by certified or registered mail to the taxpayer of the filing of such appeal by the state. If any taxpayer against whom an assessment is made by the department of revenue under any assessment required by law to be made by the department of revenue is dissatisfied with the final assessment as fixed by the said department of revenue, he may appeal from said final assessment to the circuit court of Montgomery county or, in cases other than public utilities, to the circuit court of the county in which the taxpayer resides, if the taxpayer has within the state a permanent residence, at the option of the taxpayer, by filing notice of appeal with the secretary of the department of revenue and with the clerk or register of the circuit court of the county to which the appeal shall be taken within 30 days from the date of said final assessment made and entered on the minutes of the department as required by law and, in addition thereto, by giving bond conditioned to pay all costs to be filed with and approved by the clerk or register of the court to which the appeal shall be taken. The taxpayer shall pay the assessment so made before the same shall become delinquent; and, if such taxes are not paid before the same becomes delinquent, the court shall upon motion ex mero motu dismiss such appeal, unless at the

time of taking the appeal the taxpayer has executed a supersedeas bond with sufficient sureties to be approved by the clerk or register of the court to which the appeal shall be taken in double the amount of the taxes payable to the state of Alabama, conditioned to pay all taxes, interest and costs due the state, county or any agency or subdivision thereof. In such appeals the party taking the appeal shall be styled the appellant and the party against whom the appeal is taken shall be styled the appellee. The assessment made by the department of revenue shall prima faci be correct, and where the appeal is taken by the taxpayer the burden shall be on the appellant to show that such assessment is incorrect. The circuit court or the supreme court of Alabama on appeal to it may, if it is of the opinion from all the evidence that the assessment as made is either too high or too low, fix the amount of such assessment. The court shall hear such appeals according to its own rules and methods or procedure so far as practicable and shall decide all questions both as to the legality of the assessment and the amount thereof. No court shall have the power to enjoin the collection of any taxes due on such assessment so appealed or to suspend the payment thereof. From the judgment of the circuit court, either the state or the taxpayer may appeal direct to the supreme court of Alabama, within 42 days from the entry of the judgment; the taxpayer shall give security for the cost of such appeal to be approved by the clerk or register of the circuit court from which the appeal shall be taken. If upon such appeal the assessment made by the department of revenue is reduced, the court, upon proof of payment of said tax, shall ascertain and recite such fact in the judgment and shall ascertain and determine by its judgment, the amount of tax which was invalid or which was excessive both as to the amount paid to the state, counties, county boards of education, municipalities or other governmental agencies receiving any part of such taxes; and, upon presentation of a certified copy of the judgment to the comptroller, it shall be the duty of the

comptroller to draw his warrant on the treasurer in favor of such taxpayer for such an amount as the judgment of the court shall ascertain and declare has been erroneously paid to the state, together with interest from date of payment, and such warrant of the comptroller shall be paid out of any funds in the treasury as a current obligation of the year in which said refund is ordered. Upon presentation of a certified copy of such judgment to the county commission of any county, or upon presentation of a certified copy of such judgment to a county board of education or to the city council or other governing body of any municipality, or upon presentation of a certified copy to the governing body of any other agency of the state which may have received any part of said tax erroneously paid as determined by the judgment, it shall be the duty of said county commission of the county, or the county board of education or the city council or other governmental body of a municipality, or of the governmental body of any other agency receiving any part of such taxes to draw its warrant on the treasurer of such county, school board, municipality or other agency in favor of the taxpayer for such amount of said tax as may have been erroneously paid to such county, school board, municipality or other agency, together with interest from date of payment. Such amounts shall constitute claims preferred over all other claims, and the respective treasurers are hereby required to refund such amounts received by said county, school board, municipality or other agency. In the event the judgment of the court shall fix an assessment greater than that appealed from when the taxpayer has paid the taxes on the assessment appealed from, the court shall fix and determine the amount of such excess, and the taxpayer and the sureties on his appeal bond shall be adjudged to pay the taxes due by reason of such increased assessment with interest from date of judgment, and the lien and priorities of the state and counties shall apply to such additional amount as in other cases. The court, in fixing the assessment, shall order the assessing authorities

to apportion the same and the collecting authorities to collect taxes thereon for the several taxing subdivisions in the manner provided by law. Where the taxpayer elects to make supersedeas bond and not to pay the taxes, the court in entering final judgment shall order that interest at the legal rate shall be paid on such assessment as finally made from the date that such taxes would have become delinquent on the original assessment. (Acts 1935, No. 194, p. 256; Acts 1936, Ex. Sess., No. 154, p. 172; Code 1940, T. 51, § 140.)

Ala. Code § 40-11-1 (1993) provides:

§ 40-11-1. Enumeration of subjects of taxation.

(a) As used in this section the following terms shall have the meanings ascribed herein:

(1) CONSTRUCTION PURPOSES. The normal and ordinary meaning of the words, except that mining activities or the transportation of materials used in or produced by mining or forestry activities shall not be construed to be included;

(2) HEAVY DUTY EQUIPMENT. Any motor vehicle used primarily off the open road for construction purposes, including all road construction equipment whose gross weight exceeds 16,000 pounds, but not including inventory on hand for sale by duly licensed equipment dealers.

(b) The subjects of ad valorem taxation, except as exempted by law, shall be as follows:

(1) Every piece, parcel, tract, or lot of land in this state, including therein all things pertaining to such land, and all structures and other things so annexed or attached thereto as to pass to a vendee by conveyance of such land; and every separate or special interest in any land, such as minerals, the right to mine minerals, the right to turpentine, oil or petroleum, natural gas, and the right to remove same from the soil, or any other interests when such interests are owned by persons other than the owner of the surface or soil, except growing crops, standing timber, or any tree, bush, vine, or other growing thing from which a crop is harvested;

(2) All docks, wharves, wharf boats, landings, warehouses, toll bridges, ferries, canals, passes, channels, turnpikes, all street railroads, printing presses, and materials;

(3) All steamboats, barges, vessels, and watercraft of every name and kind however propelled, plying waters of this state, and the owner thereof shall return same for taxation to the assessors in the county wherein he resides; and, if such steamboat, barge, vessel, or watercraft is owned by a corporation, then in that county where its principal office is located; in the case of the owner's being an individual not residing in this state or being a corporation with no principal office in this state, then in the county or counties where used; all such steamboats, barges, vessels, or watercraft whether owned by a resident or nonresident of this state, which have acquired a permanent situs in this state. All transfer boats, steamboats, or barges used by any railroad in transferring cars and passengers must be assessed and taxed in the county or counties where used, or where the owner resides, regardless of where such vessel may be registered;

(4) All stocks of goods, wares, and merchandise, the assessment to be on the average amount on hand during the preceding year, except in cases where business is commenced on or after October 1 of a current year, and in such cases the assessment to be on the capital actually employed in the business and apportioned as hereinafter provided, but the amount so assessed for any whole year shall in no case be less than the capital actually employed in the business, and this shall include all goods, wares, and merchandise kept on plantations or elsewhere, or by railroad companies or persons, for sale or to be dealt out to laborers or employees for profit, or on account of their wages, and shall include all goods, wares, and merchandise offered for sale by any person commencing business subsequent to October 1 of a current year, but in such case the tax shall be apportioned according to the date at which the business was commenced, so that if commenced after January 1, the tax shall be three fourths of the tax for the whole

year; if commenced after April 1, the tax shall be one half of the tax for the whole year; provided, that the assessment herein provided for shall not include products raised on the farms in the hands of the original producers. If the person, association or corporation, receiver, or trustee carrying on such business shall fail to make return of the amount of stock of goods, wares, and merchandise as provided by law, or if the county tax assessor is not satisfied with the return made, in order to make proper assessment, he shall have the right to demand a copy of the last inventory made of such stock of goods, wares, or merchandise, and may also by inquiry of persons believed to have knowledge of the subject obtain information as to the probable average amount of such stock, and from such information may assess the same upon his best judgment;

(5) All household and kitchen furniture, mechanical and electrical refrigerators, libraries, jewelry, precious stones, plate and silverware, ornaments and articles of taste, pianos and other musical instruments, paintings, clocks, gold, silver and other watches and gold and other safety chains, all wagons and other vehicles; all motor cars, automobiles, trucks, buses, tractors, motorcycles, and other motor vehicles and bicycles; travel trailers, utility trailers, semitrailers, and all other trailers of any kind; all outboard motors; airplanes, airships, and other aircraft and aircraft landing fields and equipment; all typewriters; all cash registers; all calculating machines; all bookkeeping machines, teletypes, dictaphones, and other recording or sending apparatus or machines; all phonographs and all machines of like character; all radio sending and receiving sets and appliances; all iron safes and cabinets, all store fixtures, all office furniture and fixtures; all mechanical tools and farming implements; all tanks, all storage reservoirs or basins; all golf bags, golf sticks, and all

other sporting goods; all pistols and guns; all cattle and horses, mules, studs, jacks and jennets; all hogs, sheep and goats, except as specifically exempted; all x-ray machines; all lens grinding machines, all eye-testing machines, all surgical instruments and all other instruments or appliances used in surgical, dental, medical, optometrical, or other professional work;

(6) All money hoarded, whether in the custody of the owner in this state, or in another state, or in any safety deposit box, safe, or vault, or elsewhere, except money on deposit in banks which is specifically exempted from taxation;

(7) All investments in bonds, except bonds of the United States, the State of Alabama, and of counties and municipalities of this state, warrants or other obligations of county and city school boards in this state, and such other bonds as are not by law taxable; and all capital invested in bonds or currency which are exempt from taxation shall be liable to be taxed under this section should such capital at any time during the year be reconverted into money, bonds, or property which is taxable, unless it is made to appear that the money, bonds, or property into which such reconversion may be made has been assessed for taxes for such year;

(8) All roadbed, track, engines, cars, derricks, cranes, signals, crossties, and other property, real and personal, of railroads, of mining and manufacturing plants, and all tramroads, pole-roads, canals, ditches, and channels used for transporting or moving mineral ore, lumber, timber, logs, minerals, coal, ore, sand, gravel, or other commodities, whether raw or manufactured, which are not taxed as improvements on the land or plant or main property, of the owner of such tramroads, pole-roads, canals, ditches, or channels;

(9) Shares in corporations or associations, not incorporated under the laws of this state, except stock in national banks; in arriving at the value of shares of stock of a corporation or association for the purposes of taxation, whether said corporation is domestic or foreign, all dividends earned or declared and not distributed shall be treated as assets of said corporations;

(10) On the gross amount of sales of goods, wares, and merchandise owned by nonresidents made at auction in or during the tax year preceding the assessment of goods, wares, and merchandise kept in stores for sale in the ordinary course of business, each auctioneer shall be assessed and shall pay a tax of one fourth of one percent, and each auctioneer shall pay a like tax on the gross amount of sales made by him of goods, wares, and merchandise owned by citizens of this state which have been imported into this state and sold at auction before same have been assessed for taxes as other property; but on sales of goods, wares, and merchandise and fruit by cargo at auction, the rate of taxation shall be one eighth of one percent;

(11) On the gross amount of commissions or sums charged and received during each year by any auctioneer; provided, that nothing herein contained shall be construed as levying a tax on commissions received for the sale or rental of real estate, or brokerage on loans or real estate or the underwriting of insurance;

(12) All the real and personal property of water companies, including pumping stations, reservoirs, standpipes, towers, pipelines, gates, valves, tunnels, canals, and dams used in the business of supplying water to consumers for pay; all real and personal property of hydroelectric power, steam, or other power and light companies; natural and manufactured gas companies and gas light companies, including all machinery, engines, dynamos, wires, poles, pipelines, tubes, and appliances of every nature and description used in connection therewith; all real and

personal property of every furnace, rolling mill, mine, quarry, or manufacturing establishment, including all machinery, all engines, hoisting engines, derricks, and appliances of every nature used in the business; all dams across rivers and creeks; all real and personal property of cotton gins, cotton mills, cotton compresses, cottonseed oil mills, grain elevators, flour and grist mills, molasses and syrup mills, paper mills, chemical plants or manufactories, fertilizer factories or mixing plants; all peanut oil mills and peanut mills, creosoting plants, concrete mixing plants, cross-tie plants, and stave mills and heading mills;

(13) All property, real and personal, of all cement plants, lime plants, plaster plants, or quarries or other manufacturing, mining, or quarrying plants not herein specifically exempted;

(14) All property, including heavy duty equipment, used for construction purposes.

(15) All manufactured homes located on land owned by the manufactured home owners, except those manufactured homes rented or leased for business purposes, other than those manufactured homes in the inventory of a manufactured home dealer or manufacturer.

(16) All other property, real, personal, or mixed, not hereinbefore specified, of whatever class, whether ejusdem generis or not, except as herein specifically exempted, which said property shall be assessed and specifically described.

(c)(1) All property described in subdivision (b)(14) brought into the state after October 1 of any tax year and before the assessor has completed his assessment, shall be subject to taxation the same as if it had been held or owned in the state on October 1. In addition, heavy duty equipment brought into the state after October 1 and after the assessor has com-

pleted his assessment shall be subject to taxation the same as if it had been held or owned in the state on October 1; except that such tax shall be prorated with respect to the number of months remaining in the year.

(2) Property described in subdivision (b)(15) shall be taxed as realty. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 21; Acts 1967, No. 240, p. 619; Acts 1973, No. 1007, p. 1542, § 1; Acts 1977, No. 698, p. 1233; Acts 1988, 1st Ex. Sess., No. 88-824, p. 265, § 4; Acts 1991, No. 91-694, p. 1340, § 4.)

Ala. Code § 40-14-40 (1993) provides:

§ 40-14-40. Amount of levy on domestic corporations.

Every corporation organized under the laws of this state, except strictly benevolent, educational, or religious corporations, shall pay annually to the state an annual franchise tax based on its capital stock as follows:

For the tax year beginning	Rate on each $1,000.00 of capital stock
January 1, 1984	$10.00
And all tax years thereafter	$10.00

provided, that in no event shall the amount paid by any corporation for annual franchise tax be less than the sum of $50. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 347; Acts 1955, 2nd Ex. Sess., No. 74, p. 191, § 1; Acts 1971, 1st Ex. Sess., No. 103, p. 184, § 1; Acts 1983, No. 83-745, p. 1233, § 1.)

Ala. Code § 40-14-41 (1993) provides:

§ 40-14-41. Levy on foreign corporations.

(a) *Amount of levy.*—Every corporation organized under the laws of any other state, nation or territory and doing business in this state, except strictly benevolent, educational or religious corporations, shall pay annually to the state an annual franchise tax of $3 on each $1,000 of the actual amount of its capital employed in this state. Corporations which have qualified to do business in this state shall for the purpose of this title prima facie be held to be doing business in Alabama; provided, that in no event shall the amount paid by any corporation for annual franchise tax be less than the sum of $25.

(b) *Definition of capital.*—The total capital of such foreign corporation shall be deemed to be an amount equal to the sum of the following:

(1) The outstanding capital stock;

(2) Surplus and undivided profits, which shall include any amounts designated for the payment of dividends until such amounts are definitely and irrevocably placed to the credit of stockholders subject to withdrawal on demand;

(3) The amount of bonds, notes, debentures, or other evidences of indebtedness maturing and payable more than one year after the first day of the franchise tax year;

(4) The amount of the bonds, notes, debentures, or other evidences of indebtedness maturing and payable at the time to (i) any individual stockholder owning directly or indirectly 10 percent or more of the capital stock of such foreign corporation, or (ii) another corporation owning more than 50 percent of the capital stock of such corporation, or (iii) another corporation more than 50 percent of the capital stock of which is owned by such foreign corporation, and

which other corporation referred to in (ii) or (iii) is not also required to pay a franchise tax to the State of Alabama;

(5) The amount reasonably required to adjust the depreciable property accounts for any rapid, excessive or unreasonable depreciation charges or amortization, so as to restore the depreciable property accounts, for franchise tax purposes, to original cost less depreciation computed on the basis of the useful life of such property to the corporation.

(c) *Determination of capital employed in state.*—The actual amount of such total capital as herein defined which is employed in this state shall be determined in accordance with generally accepted accounting principles appropriate in the particular case, and such determination shall establish a rebuttable presumption as to the actual amount of capital employed by the corporation in this state; provided, that in the case of organizations whose accounts and records are kept according to rules prescribed by a regulatory agency or instrumentality of the United States or by the Alabama Public Service Commission, or by a state insurance department, the actual amount of capital employed in this state as so determined shall in no event exceed the value of the sum of its tangible property located in this state and its intangible property employed in the conduct of its business in this state.

(d) *Exclusions and deductions.*

(1) There shall be excluded from the amount of capital as determined in subsection (b) of this section the investment by the taxpayer in the capital of other corporations organized under the laws of Alabama, or under the laws of any other state if such other corporations also pay a franchise tax to the State of Alabama, unless the taxpayer is a dealer in stocks or securities, and

(2) There shall be deducted from the amount of capital employed in this state as determined in accordance with subsections (b) and (c) of this section, the following amounts:

a. The aggregate amount of loans of money made by the taxpayer in this state and which shall be secured by existing mortgage or mortgages to it on real estate in this state and upon which mortgage or mortgages there shall have been paid the recording privilege tax provided by law;

b. The amount invested by the taxpayer in bonds or other securities issued by the State of Alabama, or any county, municipality, or other political subdivision of the State of Alabama, or any public corporation organized under the laws of the State of Alabama, unless such corporation is a dealer in securities;

c. The amount invested by the taxpayer in all devices, facilities, or structures, and all identifiable components thereof or materials for use therein, acquired or constructed primarily for the control, reduction, or elimination of air or water pollution; and

d. The amount invested by the taxpayer in all real and tangible personal property, equipment, facilities, structures, and components thereof, and materials used in the manufacturing. assembling, or constructing of products or equipment of any kind that are acquired or constructed by the taxpayer and placed in service in a qualifying county of the state (as hereinafter defined) within a period commencing with the date of issuance of a qualification certificate as provided for herein and ending five years thereafter (such real and personal property, equipment, facilities, structures and components thereof, and materials being herein called "qual-

ifying property"). Before any such amount invested by a taxpayer may be deducted from the amount of its capital employed in this state as determined in accordance with subsections (b) and (c) of this section, a qualification certificate must be issued to the taxpayer prior to the due date of the report required by Section 40-14-44 for the year in which investment in qualifying property is first made, a copy of which such qualification certificate shall be filed with the taxpayer's report made pursuant to Section 40-14-44 for such year and for each year thereafter. Such qualification certificate shall state that a committee composed of the Governor of the state, the State Finance Director, and the Revenue Commissioner of the state has, prior to or on the date of such qualification certificate, met and determined, as of such date, 1. that the county in which qualifying property owned or to be owned by the taxpayer is or is to be located was a qualifying county as herein defined, 2. that the Alabama Development Office (or such similar organization of the state which shall succeed to its duties) has certified to the Governor that the economic benefits of investment by the taxpayer in qualifying property located or to be located in the qualifying county will be of a type advantageous to the well-being of the citizens of the state and of significant benefit to the qualifying county in terms of reducing the rate of unemployment therein, and 3. that the taxpayer has entered into an agreement or agreements with the state of the type hereinbelow described. A "qualifying county" for purposes of this subparagraph d. shall be any county of the state (i) which, as of the calendar month next preceding the date of any qualifcation cer-

tificate issued hereunder, has an unemployment rate higher than that of the United States for the same month, in both cases as published in the official statistics compiled and reported by the Bureau of Labor Statistics of the United States Department of Labor, and (ii) the governing body of which shall have, prior to the date of any qualification certificate issued hereunder, presented to the Governor a certified copy of a resolution adopted by the governing body of the county approving of and urging the issuance of qualification certificates of the committee herein provided for with respect to investments in qualifying property made by taxpayers in the county. The issuance by the committee of any qualification certificate hereunder shall be conditioned upon the taxpayer having prior thereto or contemporaneously therewith entered into such agreement or agreements with the state as the committee herein provided for shall have determined to be appropriate, which such agreements may be signed in the name of said committee for and on behalf of the state by the Governor, pursuant to which the taxpayer shall have agreed to invest, within such period as said committee shall specify, such amounts in qualifying property located in a qualifying county as said committee shall specify. The right of any taxpayer to deduct, pursuant to the lawful issuance of a qualification certificate as provided for herein, amounts invested in qualifying property shall not be subject to revocation and shall continue to be effective so long as and to the extent the taxpayer shall have amounts invested in qualifying property, unless the taxpayer shall fail to comply with the terms of the agreement or agreements with the state hereinabove provided for,

in which case the right of the taxpayer to deduct amounts reflecting investments in qualifying property shall cease and determine. The committee provided for herein shall be empowered to issue qualification certificates as provided for herein only during the period commencing with April 30, 1985, and ending on the date five years thereafter.

e. The amount invested by the taxpayer in all real and tangible personal property, equipment, facilities, structures, and components thereof including all aircraft replacement parts, components, systems, supplies, and sundries affixed or used on said aircraft, and ground support equipment and vehicles used by or for the aircraft, when used by a certificated or licensed air carrier with a hub operation within this state, for use in conducting intrastate, interstate, or foreign commerce for transporting people or property by air. For the purpose of this paragraph, the words "but operation within this state" shall be contrued to have all of the following criteria:

1. There originate from the location 15 or more flight departures and five or more different first-stop destinations five days per week for six or more months during the calendar year; and

2. Passengers and/or property are regularly exchanged at the location between flights of the same or a different certificated or licensed air carrier. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 348; Acts 1955, 2nd Ex. Sess., No. 74, p. 191, § 2; Acts 1961, No. 912, p. 1462, § 1; Acts 1963, No. 255, p. 666, § 1; Acts

1965, No. 764, p. 1375; Acts 1969, No. 1138, p. 2126; Acts 1971, 1st Ex. Sess., No. 103, p. 184, § 2; Acts 1971, No. 499, p. 1210; Acts 1973, No. 469, p. 678; Acts 1973, No. 1173, p. 1981; Acts 1985, No. 85-412, p. 374; Acts 1986, No. 86-214, p. 282, § 5.)

Ala. Code § 40-14-70 (1985 Supp.) provided:

§ 40-14-70. Assessment and collection.

(a) Every share of any domestic corporation except:

(1) Financial institutions which comply with the provisions of this title as to the excise taxes herein levied on such financial institutions (financial institutions within the meaning of this section and as expressly exempted from the provisions hereof are hereby defined as follows: Any corporation or any legal entity whatever doing business in this state as a bank, banking association, trust company, industrial or other loan company, building and loan association and any other corporation or institution employing money capital coming into competition with the business of national banks); and

(2) Insurance companies which are subject to the provisions of this title as to premium taxes herein levied on such insurance companies and which shall be exempt from the tax assessed hereunder,

shall be assessed and the taxes thereon collected in the county wherein such corporation has its home or principal office in the state and shall be assessed at 20 percent of its value to the person in whose name such shares stand on the books of the corporation and not to the corporation.

(b) In the event the excise tax levied by this title upon such financial institutions be declared unconstitutional, the tender to the department of revenue of such excise tax despite such unconstitutionality shall be a bar to any demand, claim, levy or assessment of any ad valorem tax under this section.

(c) The president or managing officer of every such corporation shall make out and return under oath to the tax assessor and to the department of revenue a list showing the total number of shares of the capital stock of such

corporation and the par value thereof, the full name and residence of each stockholder, as far as known, the actual value thereof, the date of the last sale of shares of stock of such corporation, with the name of the seller and the purchaser and the price paid for same, and the annual dividend declared on the stock of such corporation for the last three years, and the value of the shares as shown by the books of the corporation, and by the last report of the officers to the shareholders, and the amount of surplus, and the amount of the undivided profits not included in the surplus, and such other information as may be required by the department of revenue. There shall be attached to the copy of the return made to the department of revenue a true balance sheet as shown by the books, showing the condition of such corporation at the close of its fiscal period next preceding October 1 of the year for which the assessment is to be made. Such corporations shall at the same time make a tax return sworn to by its president or manager to the department of revenue and to the county tax assessor on forms prescribed and furnished by the department of revenue of all taxable property, real and tangible personal, situated in the state and owned by such corporation.

(d) The department of revenue, after determining the total value of the shares of capital stock, shall deduct from the total value of such shares:

(1) The book value of real and tangible personal property owned in other states, and the book value of all devices, facilities or structures, and all identifiable components thereof, or materials for use therein, designed or constructed primarily for the control, reduction or elimination of air or water pollution in this state, and used by the domestic corporation primarily for the control, reduction or elimination of air or water pollution where such air or water pollution has been caused by the domestic corporation claiming the deduction.

(2) The book value of goods, wares and merchandise held for sale.

(3) The book value of all real and tangible personal property, equipment, facilities, structures and components thereof and materials used in the manufacturing, assembling or constructing of products or equipment of any kind that are acquired or constructed by the corporation and placed in service in a qualifying county of the state (as hereinafter defined) within a period commencing with the date of issuance of a qualification certificate as provided for herein and ending five years thereafter (such real and personal property, equipment, facilities, structures and components thereof and materials being called "qualifying property"). Before the book value of any such qualifying property may be deducted from the total value of the shares of capital stock of the corporation as determined in accordance with the provisions of this section, a qualification certificate must be issued to the corporation prior to the due date of the return required to be made to the department of revenue by paragraph (c) of this section for the year in which qualifying property is first reflected on the balance sheet of the corporation required to be filed with such return; a copy of such qualification certificate shall be filed with the corporation's return made to the department of revenue pursuant to paragraph (c) of this section for such year and for each year thereafter. Such qualification certificate shall state that a committee composed of the governor of the state, the state finance director and the revenue commissioner of the state has, prior to or on the date of such qualification certificate, met and determined, as of such date, a. that the county in which qualifying property owned or to be owned by the taxpayer is or is to be located was a qualifying county as herein defined, b. that the Alabama development office (or such similar organization of

the state which shall succeed to its duties) has certified to the governor that the economic benefits of investment by the taxpayer in qualifying property located or to be located in the qualifying county will be of a type advantageous to the well-being of the citizens of the state and of significant benefit to the qualifying county in terms of reducing the rate of unemployment therein, and c. that the corporation has entered into an agreement or agreements with the state of the type hereinbelow described. A "qualifying county" for purposes of this section shall be any county of the state (i) which, as of the calendar month, next preceding the date of any qualification certificate issued hereunder, has an unemployment rate higher than that of the United States for the same month, in both cases as published in the official statistics compiled and reported by the bureau of labor statistics of the United States department of labor, and (ii) the governing body of which shall have, prior to the date of any qualification certificate issued hereunder, presented to the governor a certified copy of a resolution adopted by the governing body of the county approving of and urging the issuance of qualification certificates of the committee herein provided for with respect to investments in qualifying property made by taxpayers in the county. The issuance by the committee of any qualification certificate hereunder shall be conditioned upon the corporation having prior thereto or contemporaneously therewith entered into such agreement or agreements with the state as the committee herein provided for shall have determined to be appropriate, which such agreements may be signed in the name of said committee for and on behalf of the state by the governor, pursuant to which the corporation shall have agreed to invest, within such period as said committee shall specify, such amounts in qualifying property located in a qualifying county as said committee

shall specify. The right of any corporation to receive the benefit of the deduction, pursuant to the lawful issuance of a qualification certificate as provided for herein, of the book value of qualifying property as provided for herein shall not be subject to revocation and shall continue to be effective so long as and to the extent the balance sheet of the corporation shall reflect the value of investments made by the corporation in qualifying property, unless the corporation shall fail to comply with the terms of the agreement or agreements with the state hereinabove provided for, in which case the corporation shall not be entitled to receive the benefit of the deduction provided for in this paragraph (d). The committee provided for herein shall be empowered to issue qualification certificates as provided for herein only during the period commencing with April 30, 1985, and ending on the date five years thereafter.

(e) The department of revenue, after determining the total value of the shares of stock remaining for assessment, shall take 20 percent thereof, which shall be the assessed value of the shares of said corporation.

(f) After the assessed value of all the shares has been passed on and determined, the department of revenue shall deduct from the assessed value of such shares the assessed value of the taxable real and tangible personal property owned, assessed and on which taxes are to be paid by the corporation, as shown by such tax return filed by the corporation in the state of Alabama, or as finally determined; provided, that should the assessed value of the real and tangible personal property as shown by such tax return differ from the assessed value of the real and tangible personal property as finally determined by the taxing authorities required to assess such property, or in case of appeal, as finally determined by the court of last resort, the same shall not affect the assessed value of all

the shares of the corporation as fixed by the department of revenue.

(g) After deducting the assessed value of the real and tangible personal property located in the state of Alabama, any remainder shall constitute the residue of said shares of stock of said corporation. The residue divided by the whole number of shares will constitute the assessment for each share of stock.

(h) Whenever the department of revenue shall have passed on the valuation and assessment of the shares of any domestic corporation as herein provided, it shall give notice in writing by certified mail, return receipt demanded, to the president or managing officer or person signing the tax return for the corporation or, if no return has been made, then such notice to be addressed to any officer of the corporation against whose shares the assessment has been made, giving notice of the valuation and assessment, stating that on a day specified, it will determine any complaint against said valuation, which notice must be served at least 10 days before the day specified for a final determination of the assessment. Upon hearing the complaint of protest against any valuation or assessment of the shares of the domestic corporation or if there has been no complaint or objection filed on or before the date specified in the notice for determination of such matter, the department of revenue shall proceed to determine and fix the value of such shares and complete the assessment thereof.

(i) It is the meaning and intent of this section that the assessed value of all the shares of the corporation be fixed by the department of revenue and that there be deducted therefrom the correct assessed value of the real and tangible personal property of the corporation when the same shall finally be determined; provided, that if any property owned by a corporation which property is subject to taxation in this state is omitted from the tax return filed by said corporation, the same shall be assessed as an escape

item or items of taxation in the same manner as escaped property of individuals and the value of such omitted property shall not be deducted from the value of the shares of stock of the corporation as assessed for taxation. If the aggregate assessed value of the shares does not exceed the aggregate assessed value of the real and tangible personal property of the corporation, then no tax shall be demanded or collected on the shares. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 25; Acts 1965, No. 391, p. 566; Acts 1965, 2nd Ex. Sess., No. 27, p. 42; Acts 1969, No. 1140, p. 2131; Acts 1973, No. 1172, p. 1978; Acts 1979, No. 79-666, p. 1170; Acts 1981, 1st Ex. Sess., No. 81-975, p. 154; Acts 1985, No. 85-413.)

Ala. Code § 40-14-73 (1993) provides:

§ 40-14-73. Corporations paying tax need not file list of shareholders.

If a corporation by endorsement on its tax assessment or otherwise in writing shall agree to pay the taxes, if any, assessed on the shares for the shareholders, it need not file a list of such shareholders. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 28.)

Ala. Admin. Code r. 810-2-3-.11 (1991) (repealed 1992) provided:

810-2-3-.11 Determination of Franchise Tax Allocation Factors by Taxpayers Engaged in Multi-State Operations

(1) Purpose—To establish a regulation to define the items and procedures for use by taxpayers in determining the Allocation Factors for foreign franchise tax.

(a) Taxpayers employing capital both with-in and with-out Alabama must complete Schedules C and D of the annual foreign franchise tax return.

(b) A taxpayer's primary use of capital employed in Alabama shall determine the appropriate Allocation Factors to be used in Schedule C of the foreign franchise tax return.

(c) Schedule C.—Allocation Data

1. Cost of manufacturing, processing or fabricating (for those engaged in manufacturing)

2. Sales by destination (for those engaged in selling activities)

3. Gross income (where there is relatively little or no manufacturing or selling)

4. Total dollar amount of active contracts (for those engaged in construction)

5. Total mileage (for those engaged in transportation)

6. Total salaries, wages, and/or salesmen, brokers, or agents commissions

7. Tangible property (original cost) and inventories

(d) Schedule D.—Allocation Factors

1. A taxpayer employing capital in Alabama primarily in Manufacturing, Processing, or Fabricating shall use an arithmetical average of the Alabama percent obtained as determined by Allocation Factors 1, 6, and 7, Schedule C.

2. A taxpayer employing capital in Alabama primarily in Selling shall use an arithmetical average of the Alabama percent as determined by Allocation Factors 2, 6, and 7, schedule C.

3. A taxpayer employing capital in Alabama primarily in Contracting shall use an arithmetical average of the Alabama percent as determined by Allocation Factors 4, 6, and 7, Schedule C.

4. A taxpayer employing capital in Alabama primarily in Transportation shall use an arithmetical average of the Alabama percent as determined by Allocation Factors 3, 5, and 6, Schedule C.

5. A taxpayer employing capital in Alabama primarily in Services shall use an arithmetical average of the Alabama percent as determined by Allocation Factors 3, 6, and 7, Schedule C.

6. A taxpayer employing capital in Alabama primarily in Rentals and/or Leasing shall use an arithmetical average of the Alabama percent as determined by allocation Factors 3 and 7, Schedule C.

Author: Louis R. Mills, Franchise Tax Division.

Authority: § 40-14-58, Code of Alabama 1975

History: Filed with LRS November 8, 1991, refiled March 6, 1992. Repealed March 20, 1992

Alabama Rule of Appellate Procedure 53 and accompanying commentary provide:

RULE 53. OPINIONS AND "NO OPINION" CASES OF THE SUPREME COURT AND THE COURT OF CIVIL APPEALS

(a) Affirmance Without Opinion. The Supreme Court or the Court of Civil Appeals may affirm a judgment or order of a trial court without an opinion if the court determines:

(1) That an opinion in the case would serve no significant precedential purpose; and

(2) That one of the following circumstances exists:

(A) The judgment or order appealed from is based on findings of fact that are not clearly, plainly, or palpably erroneous;

(B) The evidence adequately supports the jury verdict on which the judgment or order is based;

(C) In a nonjury case in which the judge has made no specific findings of fact, the evidence would support those findings that would have been necessary to support the judgment or order;

(D) The order of an administrative agency is sufficiently supported by the evidence in the record;

(E) The appeal is from a summary judgment, a judgment on the pleadings, or a judgment based on a directed verdict, and that judgment is supported by the record; or

(F) The court, after a review of the record and the contentions of the parties, concludes that the judgment or order was entered without an error of law.

(b) Designation of Category. When the Supreme Court or the Court of Civil Appeals affirms a judgment without an opinion, it shall in its order of affirmance designate the case as a "No Opinion" case and in its order of affirmance it shall also cite section (a)(1) of this rule and that subpart of section (a)(2) relied upon by the court in its decision to write no opinion.

(c) Publication of Decisions. The reporter of decisions shall publish all opinions of the Supreme Court and the Court of Civil Appeals in the official reports of Alabama decisions, but the text of an order of affirmance in a "No Opinion" case shall not be published in the official reports. The "No Opinion" cases of each court shall be collected in a periodic "Table of Decisions Without Published Opinions," which shall be published in the official reports and which shall indicate the action taken in all "No Opinion" cases. However, if in a "No Opinion" case a Justice or Judge writes a special opinion, either concurring with or dissenting from the action of the court, the reporter of decisions shall publish that special opinion, along with a statement indicating the action to which the special opinion is addressed.

(d) Unpublished Decisions Not Precedent. Orders or judgments of the Supreme Court and the Court of Civil Appeals not published in the official reports have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrines of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar.

(e) Time of Publication. An opinion of the Supreme Court shall not be published while an application for rehearing is pending, and an opinion of the Court of Civil Appeals shall not be published while an application for rehearing is pending or while a petition for certiorari review is pending in the Supreme Court. However, the delay

in publication caused by this provision shall not affect the precedential value of an opinion.

[Adopted effective January 1, 1993.]

Court Comment to Rule 53,
Adopted Effective January 1, 1993

This rule is intended to reduce the number of opinions being written by the Supreme Court and the Court of Civil Appeals. It is not intended to affect the current practice of the Court of Criminal Appeals of affirming judgments by unpublished "memorandums" or "memorandum opinions." Therefore, this rule has no application to the Court of Criminal Appeals. See Rule 54.

It is the intent of this rule to eliminate opinions except in those cases wherein an opinion would serve some real purpose. In a case in which none of the specific circumstances set out in section (a)(2)(A) through (E) applies, the court may nevertheless affirm under the more general language of (a)(2)(F). The language of (a)(2)(A) through (F) is intended to allow the courts to omit opinions in most cases wherein the affirmance does not call for the court to establish a new principle of law; to construe a provision of a constitution, statute, ordinance, or court rule; to alter or modify an existing principle of law or to extend it to a new factual context; to reaffirm a principle not applied in a recently reported opinion; to decide an issue of general or continuing public interest; or to resolve a conflict or apparent conflict of authority.